Received L Read

1707

SUPREME COURT OF THE UNITED STATES.

No. ~~145.~~ 74.

WILLIAM F. HAVEMYER, PL'FF.

VS.

THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.

709

SUPREME COURT OF THE UNITED STATES.

No. 145.

WILLIAM F. HAVEMYER, PL'FF.

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Præcipe for summons	1	1
" and return	2	2
Declaration	3	2
Plea	9	9
Affidavit of merits	11	13
Demurrer and replication	13	13
Substitution of attorney	15	15
Rejoinder in demurrer	16	15
Demurrer submitted, overruled, trial and verdict, and motion for new trial	17	16
Argument of motion for new trial	18	17
Second trial by consent	19	17
Certificate of division of opinion	20	18
Exhibit No. 1	28	22
Exhibit No. 2	31	24
Exhibit No. 3	34	25
Exhibit No. 4	36	26
Certificate of clerk	42	30

1 District court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday, being the sixth day of July, A. D. 1863.

Present and presiding: The Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States assigned to said circuit, and honorable Andrew G. Miller, district judge.

JOHN M. MILLER, *Clerk*.

Among other the following proceedings were had, to wit:

WILLIAM F. HAVEMYER, plaintiff,
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA, defendant.
} 73. Law docket. A debt.

Be it remembered that heretofore, to wit, on the twenty-fifth day of November, A. D. 1861, came the above-named plaintiff by his attorneys, Messrs. Carpenter & Gridley, and filed his *præcipe* for a summons, as follows:

Præcipe for summons.

District court of the United States of America for the district of Wisconsin.

WILLIAM F. HAVEMYER
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

I issue a summons in the above-entitled cause of a plea of debt, to the plaintiff's damage two thousand dollars, returnable the first Monday of December next ensuing.

CARPENTER & GRIDLEY,
Plaintiff's Attorneys.

To J. M. MILLER, esq., clerk.

Whereupon a summons issued as follows:

2 THE UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The President of the United States of America, to the marshal of the district of Wisconsin, greeting:

[SEAL.] You are hereby commanded to summon the board of supervisors of the county of Iowa to appear before the district court of the United States of America for the district of

Wisconsin, aforesaid, at Milwaukee, on the first Monday of December ensuing, then and there to answer unto William F. Havemyer in a plea of debt, to his damage two thousand dollars, which shall then and there be made to appear, and of this writ make due return.

Witness the Hon. Andrew G. Miller, judge of the said district court of the United States, at the city of Milwaukee, in the said district of Wisconsin, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

J. M. MILLER, *Clerk.*

CARPENTER & GRIDLEY, *Attorneys.*

Return to summons.

And on or before the return day of said writ came the said marshall and returned the same, with his return endorsed thereon, as follows:

"Served on the within named, the board of supervisors of the county of Iowa, by showing Henry Dunstan, clerk of said board, this summons, and delivering him a copy thereof, this 29th day of November, 1861.

"D. C. JACKSON, *Marshal.*
"By A. C. JACKSON, *Deputy.*"

Declaration.

And afterwards, on the third day of December, 1861, came the said plaintiff, by his said attorneys, and filed his declaration, as follows:

3 District court of the United States for the district of Wisconsin, of the 1st Monday of December, A. D. 1861.

WILLIAM F. HAVEMYER
versus
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

DISTRICT OF WISCONSIN, *ss:*

William F. Havemyer, who is a citizen of the State of New York, plaintiff in this suit, by Carpenter & Gridley, his attorneys, complains of the board of supervisors of the county of Iowa, a citizen of the State of Wisconsin, and a corporation created by and existing under and by virtue of the laws of the State of Wisconsin, defendant in this suit, of a plea that it render to the said plaintiff the sum of eighteen hundred dollars, which it owes to and unjustly detains from the said plaintiff.

For that whereas, by an act of the legislature of the State of Wisconsin, approved March 23, 1853, entitled "An act to authorize the counties and towns through which the Mineral Point railroad passes to aid in its construction," it was among other things provided, that it should be lawful for any county through any portion of which any part of the Mineral Point railroad should run, or any town or incorporated city or village in such county, to issue and deliver to said Mineral Point Railroad Company its bonds, payable to such person or persons, trustees or corporation, or to said company, at such time, for such sum or sums, at such rate of interest, transferable by general or special endorsement or by delivery, and in such manner as might be agreed upon by and between the directors of said railroad company and the proper officers of such county, town, incorporated city, or village, as in said act thereinafter provided, and to receive in exchange for such bonds the stock or bonds of said railroad company in such manner as should be agreed upon by and between the directors of said railroad company and the proper officers of said county, town, incorporated city, or village, as thereafter in said act provided; but that no such bonds should be issued or delivered to said company by any such county, town, incorporated city, or village, unless a majority of the legal voters of such county, town, incorporated city, or village, voting on the question, should first have voted in favor of such issue in the manner thereinafter prescribed; that it should be lawful for the Mineral Point Railroad Company to issue its bonds, payable to the treasurer of the State of Wisconsin and his successors in office, or to bearer, in the sum of one thousand dollars each, which should not exceed, in the aggregate, ten thousand dollars per mile of the whole of the surveyed line of the said railroad, and bearing an interest not exceeding the rate of ten per centum per annum, payable at such place and at such time, not exceeding twenty years from their date, as said company shall elect, with a provision making them transferable by a general or special endorsement or by delivery; and all such bonds which shall be delivered to any such county, town, incorporated city, or village, in exchange as aforesaid, shall contain a stipulation guaranteeing the payment of principal and interest which should become due and payable on bonds of said county, town, incorporated city, or village, received in exchange therefor by said company, and to secure the payment of such bonds and interest, it should also be lawful for the said company to execute and deliver to the treasurer of said State, and his successors in office, in trust for the use and benefit of the holders of any and all of said bonds, a deed of conveyance, to be called a second mortgage, of all the present and thereafter to be acquired property of said company in the whole of said railroad, including the right of way and land occupied by said road, together with the superstructure and tracts thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, depot grounds, and buildings thereon, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property; which said second mortgage should be taken, deemed and held to be subject and subsidiary to another deed of conveyance, to be called a first mortgage, of all the aforesaid property, which said first mortgage, whether it should have been executed prior or subsequent to said second mortgage in point of time, should constitute the first lien upon said railroad and all the aforesaid property; but that said first mortgage should not be issued to secure the payment of bonds to a greater amount than ten thousand dollars per mile of the whole length of said road, nor bearing a rate of interest greater than at the rate of ten per centum per annum.

And that whenever said second mortgage should be delivered to the treasurer of said State, and recorded in the office of the secretary of state of said State, it shall constitute a perfect and
4 indefeasible lien upon said railroad, and upon all the property
described in it, subject only to the prior lien created by said first mortgage; that whenever the said railroad company shoud desire to exchange any amount of its stock or bonds for the bonds of any such county, town, incorporated city, or village, it should make and deliver to the clerk of the board of supervisors of such county, the town clerk, or clerk of such incorporated city or village, a definite proposition in writing, signed by the president and secretary of said railroad company, and sealed with the common seal of said company, which proposition should contain a distinct statement of the amount of the stock or of the bonds of said company, which said company should propose to issue to such county, town, incorporated city, or village, the time when such bonds should be payable, the amount for which they should respectively be issued, and the rate of interest which they should bear, and of the amount of the bonds of such county, town, incorporated city, or village, which said company should propose to receive in exchange for its stock or bonds as aforesaid, specifying the person or persons, trustee or corporation, to whom they should be payable, the mode of transfer, the amount of each bond and the aggregate amount, the rate of interest at the time of payment; and that upon receiving such proposition, the clerks of the board of supervisors of such county, the town clerk, or clerk of such incorporated city or village, should immediately call a meeting of the board of supervisors of such county, town, incorporated city, or village, to take into consideration such proposition, and that if deemed expedient, the said board should publish, or cause to be published, a notice of an election to be held by the legal voters of such county, town, incorporated city, or village, at the usual place or places of holding elections in such county, town, incorporated city, or village, and at such time as he might designate, which should not be less than twenty nor more than thirty days from the date of such notice; and that said notice should contain a full statement of the proposition made by said railroad company with reference to the exchange of its stock or bonds for the bonds of such county, town, incorporated city, or village, and should call upon the voters to deposit a ballot, upon which should be written "for the railroad proposition," or "against the railroad proposition," or other words tantamount thereto; that such election should be held and conducted in the same manner as other general elections in such counties, towns, incorporated cities, or villages, were by law required to be held and conducted, and the votes cast at such election should be counted, canvassed, and returned in the manner as the votes at any such general election; and that the canvassers should make, certify, sign, and deposit with the

clerk of such county, town, incorporated city, or village, a statement of the whole number of votes cast upon the question, as well as a statement of the number for the railroad proposition, and of the number against the railroad proposition, and that such certificate should be conclusive evidence of the fact as to the number of votes cast for or against such proposition, and also of the fact that such election was regularly held and conducted according to law; that if a majority of the legal voters who should vote on the question at any election to be held in any such county, town, incorporated city, or village, in pursuance of the provisions of said act, should as indicated by the official returns of any such election vote for the railroad proposition, it should be the duty of the proper officers of every such county, town, incorporated city, or village, upon receiving from the directors of said railroad company stocks or bonds in conformity with the proposition of said railroad company, to issue and deliver to the directors of said railroad company the bonds of such county, town, incorporated city, or village, in conformity with said proposition, and for the purpose of giving effect to the provisions of said act, the proper officers of every county, town, incorporated city, or village, mentioned in said act, were in said act declared to be the chairman of the county board of supervisors and the clerk of the board of supervisors in each county, the chairman of the board of supervisors and the town clerk in each town, the mayor and city clerk of each incorporated city, and the president and clerk of each incorporated village, and that all bonds issued by any of the said counties, incorporated cities, or villages, should be signed by the proper officers as aforesaid of the said county, cities, or villages, under their corporate seals respectively; and all bonds issued by any such town shall be signed by the proper officers of such town, and have annexed to them the official certificate of the clerk of the county board of supervisors, under his official seal, that they are such officers, and that their signatures are genuine; and that every county, town, incorporated city, or village, by the provisions of said act authorized to issue any bonds, should be severally liable in law, faithfully, promptly, and at maturity, to pay and discharge the principal and interest due upon every such bond, and the separate faith of every such county, town, incorporated city, or village, should, by the issue of said bonds, be irrevocably inviolably pledged for the prompt discharge of every such liability.

That afterwards, to wit, on or about the 19th day of May, 1853, the said railroad company made and delivered to the clerk of the board of supervisors of the county of Iowa, through a part of which county the said Mineral Point railroad ran, a definite proposition in writing, signed by Moses M. Strong, president, and Thomas S. Allen, secretary of said railroad company, and sealed with the common seal of said company; which said proposition was in all respects in conformity with the provisions of said act, wherein said railroad company proposed that the proper officers of said county of Iowa should make, execute, and deliver to the said railroad company the bonds of said county, to the amount of one hundred and fifty thousand dollars, in sums of one thousand dollars each, payable to the treasurer of said railroad

company, and his successors in office, transferable by general or special
endorsement or by delivery, bearing interest at the rate
5 of eight per cent. per annum, payable semi-annually, on the
1st day of July and January in each year, at the Manhattan Bank, in the city of New York, with coupons attached, with the principal payable on the 1st day of July, A. D. 1868. The said company therein also proposed to make, execute, and deliver to said county of Iowa, in exchange for the aforesaid bonds of said county, the second mortgage convertible bonds of the said company, at the option of the county, at any time before maturity, to the amount of one hundred and fifty thousand dollars, in sums of one thousand dollars each, issued in conformity with the provisions of the said act, which bonds should be payable to the treasurer of the said State, and his successors in office, or to bearer, be transferable by general or special endorsement, or by delivery, and should be part of an issue of bonds which should not exceed, in the aggregate, ten thousand dollars per mile of the whole of the surveyed line of the said railroad, and bearing interest at the rate of eight per cent. per annum, payable semi-annually on the 1st days of July and January, in each year, at the Manhattan Bank, in the city of New York, with the principal payable on the 1st day of July, A. D. 1868, containing a stipulation guaranteeing the payment of the principal and interest which should become due and payable on any bonds of said county of Iowa which might be received by the said company in exchange for the bonds of said company, and that the payment of any such sums of principal or interest, or any of the bonds of said county, should operate as a release and discharge of the said company from the payment of the same amount of the principal or interest of the bonds so issued by said company; and to secure the payment of such second mortgage bonds and interest, the said company proposed therein to execute and deliver, in conformity with the provisions of said act, to the treasurer of said State, and his successors in office, in trust for the use and benefit of the holders of any and all of said bonds, a deed of conveyance, to be called a second mortgage, of all the present and thereafter to be acquired property of said company in the whole of said railroad, including the right of way and land occupied by said railroad, together with the superstructure and tracks thereon, bridges, viaducts, culverts, fences, equipments, depot grounds and buildings thereon, engines, tenders, cars, tools, materials, machinery, fixtures, and all other property, which second mortgage should be taken, deemed and held as in said act provided.

That the above proposition was received by James B. Gray, clerk of the board of supervisors of said county, who immediately thereafter called a meeting of the board of supervisors of said Iowa county to take into consideration the said proposition, when, it being by said board of supervisors of said county deemed expedient, the said board caused to be published a notice of an election to be held by the legal voters of said county at the usual places of holding elections in said county, on the 20th day of June, A. D. 1853, in the usual places for holding elections in said county; and that said election was in all things held and conducted in the manner by said act provided, and that the votes cast at said election were counted, canvassed, and returned in the manner by said act provided.

And that afterwards, to wit, on the 28th day of June, A. D. 1853, Samuel Thomas and Edward Coode, two justices of the peace of said county, and James B. Gray, clerk of the board of supervisors of said county, after having duly and legally canvassed said votes, did, as such canvassers, make, certify, sign, and deposit, as required by said act, a statement of the whole number of votes cast upon the question aforesaid, as well as a statement of the number of votes "for the railroad proposition," and of the number of votes "against the railroad proposition." And that the whole number of votes cast was two thousand five hundred and thirty-two; and that the whole number cast for the railroad proposition was one thousand three hundred and forty-five, and that the whole number cast against the railroad proposition was eleven hundred and eighty-seven; that a majority of the legal voters who voted on said question at said election, held in said county pursuant to said act, did, as indicated by the official returns of such election, vote "for the railroad proposition;" and it then and there became and was the duty of the said chairman and clerk of the board of supervisors of said county, upon receiving from the directors of said railroad company bonds in conformity with said proposition, to issue and deliver to the directors of said company the bonds of such county, in conformity with said proposition.

And that said chairman and clerk did receive then and there, from the said directors, bonds in conformity with said proposition; and that said chairman and clerk did thereafter, at Mineral Point, in said county of Iowa, on the 26th day of July, A. D. 1853, issue and deliver to the said directors of said company the bonds of said county, in conformity with said proposition, numbered from one to one hundred and fifty, respectively, in sums of one thousand dollars each, payable to the treasurer of the said railroad company and his successors in office, or to the bearer thereof, at the Bank of the Manhattan Company, in the city of New York, on the first day of July, in A. D. 1868, and also interest thereon at the rate of eight per cent. per annum, semi-annually, on the 1st day of each January and each July ensuing the date of said bonds, until the said principal sum should be paid, on presentation of the coupons or interest warrants annexed to said bonds, respectively, at the said Bank of the Manhattan Company; whereby the said county of Iowa, the said defendant, became bound to pay the said several sums and interest mentioned in said bonds, respectively, as in said bonds and coupons mentioned and as hereinbefore set forth.

And for that whereas the said plaintiff is now the holder and owner of twenty-six coupons, each for the payment of the sum of forty dollars, and each of said coupons is of the tenor following, except that each coupon is numbered with the number of the bond, respectively, to which the same was attached—that is to say:

6 $40. No. 131.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of January, 1854, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being interest due that day on the bond of said county, number 131, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH, *Chairman.*

JAMES B. GRAY,
Clerk Board of Supervisors.

And for that whereas the said plaintiff is now the owner and holder of nineteen of said coupons, each of the tenor following, except that each of said coupons is numbered with the bond to which the same was, respectively, attached—that is to say:

$40. No. 130.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of July, 1854, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, numbered 130, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26th, 1853.

JOHN MESSERSMITH,
Chairman Co. Board of Supervisors.

JAMES B. GRAY,
Clerk of Board of Supervisors.

7 Being forty-five coupons in all, for the aggregate amount of eighteen hundred dollars, and that all of said coupons are the property of the said plaintiff, and are all due and unpaid, and that the interest on the said bond specified in said coupons has never been paid by said defendant, nor by any other person or persons, but now remains unpaid and owing to the said plaintiff from the said defendant, according to the tenor and effect of said coupons, respectively. Yet though the sum of eighteen hundred dollars is now due, and has long since been due on said coupons from said defendant to said plaintiff, yet the said defendant hath never paid the said sum, but refuses and neglects so to do, whereby an action hath accrued to the said plaintiff to demand and have of the said defendant the said sum of eighteen hundred dollars, which said defendant now owes to and unjustly detains from the said plaintiff.

And whereas, also, the said defendant, afterwards to wit, on the first day of July, A. D. 1861, at the city of New York, to wit, at the district of Wisconsin aforesaid, was indebted to the said plaintiff in the further sum of eighteen hundred dollars, for so much money before that time, and then due and payable from the said defendant to the said plaintiff, upon coupons or interest warrants, each for the sum of forty dollars, which coupons or interest warrants are of the following tenor—that is to say:

$40. No. 131.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of January, 1854, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being
8 interest due that day on the bond of said county, number 131, issued to the treasurer of the Mineral Point Railroad Company.
Dated July 26th, 1853.

JOHN MESSERSMITH,
Chairman Co. Board of Supervisors.

JAMES B. GRAY,
Clerk Board of Supervisors.

Except that the number of said coupons vary, being numbered with the bonds to which they were attached; and except, also, that of said coupons, twenty-six were payable January 1st, 1854, nineteen were payable July 1st, 1854, to be paid to the said plaintiff according to the tenor and effect of said coupons; yet although the said sum of eighteen hundred dollars hath been long since due and payable, and although often requested, the said defendant hath never paid the same, or any part thereof, but refuses so to do, whereby an action hath accrued to the plaintiff to demand and have of the said defendant the said sum of eighteen hundred dollars, which the said defendant owes and unjustly detains from said plaintiff, to the damage of the said plaintiff of two thousand dollars, and therefore he brings his suit, &c.

CARPENTER & GRIDLEY,
Pl'ff's Att'ys.

And afterwards, on the first day of March, 1862, came the said defendant, by its attorney, Mr. Ryan, and filed its plea.

9 *Plea.*

In the district court of the United States for the district of Wisconsin.

WILLIAM F. HAVEMYER
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA. } Of January term, 1862.

1. And the said defendant, by E. G. Ryan, its attorney, comes and defends the wrong and injury, when, &c., and says that it does not owe the several sums of money in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country, &c.

2. And for a further plea in this behalf, by leave of the court here, in that behalf first had and obtained, the said defendant says that it ought not to be charged with the said debt by virtue of the supposed coupons or instruments in writing in the said declaration mentioned, because it says that the said supposed coupons or instruments in

writing, mentioned in the several counts of the said declaration, are the same identical coupons or instruments in writing severally declared on in each of the said counts, and not other or different, to wit, at the place aforesaid. And the said defendant avers, that the said supposed coupons or instruments in writing are severally supposed coupons or interest warrants of certain supposed bonds of the said county of Iowa, in the first count of the said declaration mentioned, to wit, at the place aforesaid. And the said defendant avers, that the several supposed bonds, hereinbefore and in the said first count of the said declaration mentioned, and whereof the said several sums of money in the said several supposed coupons or instruments in writing, in the said declaration mentioned, are interest, are not, nor is any or either of them, the deed of the said defendant. And of this the said defendant puts itself upon the country, &c.

3. And for a further plea in this behalf, by leave of the court here in that behalf first had and obtained, the said defendant says that it ought not to be charged with the said debt by virtue of the supposed coupons or instruments in writing, in the said declaration mentioned, because it says that the said supposed coupons or instruments in writing mentioned in the several counts of the said declaration are the same identical coupons or instruments in writing severally declared on in each of the said counts, and not other or different, to wit, at the place aforesaid. And the said defendant avers that the said several supposed coupons or instruments in writing are severally supposed coupons or interest warrants of certain supposed bonds of the said county of Iowa in the first count of the said declaration mentioned, and were attached to and formed part of the said several supposed bonds, to wit, at the place aforesaid. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment if it ought to be charged with the said debt by virtue of the said supposed coupons, or instruments in writing, &c.

4. And for a further plea in this behalf, by leave of the court here in that behalf first had and obtained, the said defendant says that it ought not to be charged with the said debt by virtue of the said supposed coupons or instruments in writing in the said declaration mentioned, because it says that the said supposed coupons or instruments in writing mentioned in the several counts of the said declaration are the same identical coupons or instruments in writing severally declared on in each of the said counts, and not other or different, to wit, at the place aforesaid. And the said defendant further avers, that
10 the said supposed coupons or instruments in writing are severally supposed coupons or interest warrants of certain supposed bonds of the said county of Iowa in the first count of the said declaration mentioned, to wit, at the place aforesaid. And tqe said defendant in fact further says, that at the time of the supposde execution, issue, and delivery of the said supposed bonds of the said county of Iowa, as in the first count of the said declaration averred, or at any time before, or for a long time after, the said supposed act of the legislature of the State of Wisconsin, entitled "An act to authorize the counties and towns through which the Mineral Point rail-

road passes to aid in its construction," had not been and was not published in pursuance of the constitution of the said State and of the statutes of said State providing for such publication then in full force, and that at the time of the said supposed execution, issue, and delivery of the said supposed bonds of the said county of Iowa, the said supposed act of the legislature hereinbefore and in the said first count mentioned had not at any time been and was not a statute or law of the said State or otherwise of any force or effect, to wit, at the place aforesaid. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment if it ought to be charged with the said debt by virtue of the said supposed coupons or instruments in writing, &c.

5. And for a further plea in this behalf, by leave of the court here in that behalf first had and obtained, the said defendant says, that it ought not to be charged with the said debt by virtue of the said supposed coupons or instruments in writing in the said declaration mentioned, because it says that the said supposed coupons or instruments in writing mentioned in the several counts of the said declaration are the same identical coupons or instruments in writing severally declared on in each of the said counts, and not other or different, to wit, at the place aforesaid. And the said defendant further avers, that the said supposed coupons or instruments in writing are severally supposed coupons or interest warrants of certain supposed bonds of the said county of Iowa in the first count of the said declaration mentioned, to wit, at the place aforesaid. And the said defendant in fact further says, that the said supposed bonds of the said county of Iowa, whereof the said supposed coupons or instruments in writing are coupons or interest warrants, and the said supposed coupons or instruments in writing, were executed, issued, and delivered as in the first count of the said declaration mentioned, by the chairman and clerk of the said defendant, without any authority of law, and without any authority, license, or action of the said defendant, to wit, at the place aforesaid. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment if it ought to be charged with the said debt by virtue of the said supposed coupons or instruments in writing, &c.

6. And for a further plea in this behalf, by leave of the court here in that behalf first had and obtained, the said defendant says, that it ought not to be charged with the said debt, by virtue of the said supposed coupons or instruments in writing, in the said declaration mentioned, because it says that the said supposed coupons or instruments in writing, mentioned in the several counts of the said declaration, are the same identical coupons or instruments in writing severally declared on in each of the said counts, and not other or different, to wit, at the place aforesaid. And the said defendant farther avers, that the said supposed coupons or instruments in writing are severally supposed coupons or interest warrants of certain supposed bonds of the said county of Iowa, in the first count of the said declaration mentioned, to wit, at the place aforesaid. And the said defendant in fact further says, that the said supposed bonds of the

said county of Iowa, whereof the said supposed coupons or instruments in writing are coupons or interest warrants, and the said supposed coupons or instruments in writing, were executed by the chairman and clerk of the said defendant, and issued and delivered by them to and obtained from them, by the said Mineral Point Railroad Company, without any authority of law and by fraud, covin, and misrepresentation; that is to say, by the false and fraudulent representation of the said Mineral Point Railroad Company, its officers and agents, that the said supposed act of the legislature of the State of Wisconsin, entitled "An act to authorize the counties and towns through which the Mineral Point railroad passes to aid in its construction," in the first count of the said declaration mentioned, had been and then was in force, and that the said Mineral Point Railroad Company had, in pursuance of the provisions of the said supposed act, made a valid proposition in writing to exchange with the said defendant the bonds of the said railroad company for the bonds of the said defendant, as in the first count of the said declaration averred, and that the said defendant had caused to be published valid notice of an election to be held by the voters of the said county, in pursuance of the provisions of the said supposed act of the legislature, as in the first count of the said declaration averred, and that such election had been duly had, held, and canvassed in pursuance of the provisions of said supposed act of the legislature, as in the first count of the declaration averred, and that it appeared by official returns and an official canvass of such supposed election, that a majority of the legal voters who voted on the question at such supposed election voted for the railroad proposition, as in the first count of the said declaration averred, to wit, the place aforesaid; whereas, in truth and in fact, the said supposed act of the legislature had not been and was not in force, and was not published and did not become a law until the fourth day of October, 1853; and the said railroad company had not made such supposed valid proposition; and the said defendant had not caused to be published such valid notice; and the said supposed election had not been duly had, held, or canvassed, to wit, at the place aforesaid. And the said defendant in fact says, that by means of such fraud, covin, and misrepresentation, and of the confidence of the said chairman and clerk in the truth thereof, the said chairman and clerk were induced by the said railroad company, 11 its officers and agents, to sign the said several supposed bonds of the county of Iowa, and to affix thereto the seal of the said county, and to sign the said supposed coupons or instruments in writing, being the interest warrants or coupons attached to and of the said supposed bonds, and to deliver the same so executed to the said railroad company, without authority of law and without the consent, license, or authority of the said defendant; which is the same identical issue and delivery of the said supposed bonds and coupons or interest warrants in the first count of the said declaration averred, and not other or different, to wit, at the place aforesaid. And this the said defendant is ready to verify. Wherefore the said defendant prays judgment if it ought to be charged with the said debt by virtue of the said supposed coupons or instruments in writing, &c.

E. G. RYAN,
Attorney for Defendant.

I certify that, in my opinion, the foregoing pleas are well founded.

E. G. RYAN,
Of Counsel for Defendant.

And on the same day, (March 1st, 1863,) the said defendant, by its said attorney, filed its affidavit of merits, as follows:

Affidavit of merits.

In the district court of the United States for the district of Wisconsin.

William F. Havemyer
vs.
The Board of Supervisors of the County of Iowa.

District of Wisconsin, *ss:*

L. W. Joiner, being duly sworn, says that he is the chairman of the board of supervisors of the county of Iowa, in the State of Wisconsin; that he is acquainted with the facts involved in this 12 cause, and is advised by the counsel of the defendants, and verily believes, that the defendants have a good and substantial defence upon the merits to the whole of the plaintiff's demand in this action; and that the several bonds, coupons, and instruments in writing, mentioned in the declaration, are not the instruments in writing, or bonds, or obligations, of the said defendants, or executed by them or by their authority; that his knowledge thereof is derived from an intimate acquaintance with the facts of the case, and with the records of the defendants.

L. W. JOINER.

Subscribed and sworn to before me this 6th day of February, 1862.

J. P. C. COTTRILL,
U. S. Com'r.

And afterwards, on the fifth day of April, A. D. 1862, came the said plaintiff, by his said attorneys, and filed his demurrer and replication, as follows:

13 *Demurrer, &c.*

District court of the United States for the district of Wisconsin.

William F. Havemyer
vs.
The Board of Supervisors of the County of Iowa.

1. As to the said first plea, by the said defendant firstly above pleaded, whereof the said defendant has put itself upon the country for trial, the plaintiff doth the like.

2. As to the said second plea, by the said defendant secondly above pleaded, whereof the said defendant has put itself upon the country for trial, the plaintiff doth the like.

3. And the said plaintiff, as to the said third plea of the said defendant by it thirdly above pleaded, says that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude said defendant from having or maintaining his aforesaid action thereof against the said defendant, and that the said plaintiff is not bound by law to answer the same; and this said plaintiff is ready to verify.

Wherefore the plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him, &c.

4. And the said plaintiff, as to the said plea of the said defendant by it fourthly above pleaded, says that the same and the
14 matters therein contained, in manner and form as the same are
above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, and that said plaintiff is not bound by law to answer the same, and this the said plaintiff is ready to verify.

Wherefore the plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to said plaintiff.

5. And the said plaintiff, as to the said plea of the said defendant by it fifthly above pleaded, says that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude said plaintiff from having or maintaining his aforesaid action thereof against said defendant, and that the said plaintiff is not bound by law to answer the same, and this the said plaintiff is ready to verify; and the said plaintiff, according to the form of the statute in such cases made and provided, states and shows to the court here the following causes of demurrer to the said fifth plea—that is to say:

1. The said fifth plea does not state nor traverse any question or matter of fact, but sets out a new conclusion of law, wherefore the plaintiff prays judgment and his debt aforesaid, together with damages by plaintiff sustained, on occasion of the detention thereof, to be adjudged to said plaintiff, &c.

15 6. And the said plaintiff, as to the plea of the said defendant by it sixthly above pleaded, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining plaintiff's aforesaid action thereof against the said defendant, because, the said plaintiff says that the said supposed act of the legislature had been and was in force, and was published, and did become a law, on the 23d day of March, 1853; and the said railroad company had made such valid propositions, and the said defendant had caused to be pub-

lished such valid notice, and the said election had been duly had, held, and canvassed, to wit, at the place aforesaid; and this the plaintiff prays may be inquired of by the country.

CARPENTER & GRIDLEY,
Plaintiff's Attorneys.

I certify that, in my opinion, the foregoing demurrer is well founded.

MAT. H. CARPENTER,
Of Counsel.

Substitution of pl'ff's att'y.

November 10, 1862. Substitution of plaintiff's attorney filed, as follows:

Circuit court of the United States, 8th judicial circuit, district of Wis.

WILLIAM F. HAVEMYER
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

You will please enter substitution of Mat. H. Carpenter, as the attorney of the plaintiff in the above-entitled suit. Dated October 6th, A. D. 1862. 16

MAT. H. CARPENTER.
N. C. GRIDLEY.

To JOHN M. MILLER, Esq., clerk.

And afterwards, on the fifth day of February, 1863, came the defendant, by its counsel, and filed its rejoinder in demurrer, as follows:

Joinder in demurrer.

In the circuit court of the United States for the district of Wisconsin.

WILLIAM F. HAVEMYER
vs.
THE BOARD OF SUPERVISORS OF IOWA COUNTY.

And the said defendant, by E. G. Ryan, its counsel and attorney, as to the said replication of the said plaintiff to the sixth plea, by the said defendant sixthly above pleaded, whereof the said plaintiff hath put himself upon the country for trial, the said defendant doth the like.

And as to the said demurrers of the said plaintiff to the third, fourth, and fifth pleas of the said defendant, by it thirdly, fourthly, and fifthly above pleaded, the said defendant says, that the said several pleas of the said defendant, lastly above mentioned, and the matters therein respectively contained, are severally sufficient to bar the said declaration and action of the said plaintiff; and the matters therein respectively contained, the said defendant is ready severally to verify and prove, as the court here shall direct, &c.

Wherefore, inasmuch as the said plaintiff hath not denied nor *nor* in any manner answered the said several pleas, the said defendant, as before, prays judgment, &c.

E. G. RYAN,
Def't's Att'y.

17 *Demurrer submitted.—Demurrer overruled, and trial and verdict.*

And the demurrer of the plaintiff to the third, fourth, and fifth pleas of defendant, being submitted by the counsel of the parties, on consideration whereof, it is ordered by the court that the said demurrer be, and hereby is, sustained, and that the said pleas are overruled, and the issue herein, on the first, second, and sixth pleas, came on to be tried; whereupon a jury was called to try the same, who came, to wit, Salmon Upson, Robert McClellan, Richard B. Winson, John B. Hull, Charles M. Fowler, Thomas Dickinson, William E. Howard, Parley J. Slunnway, Peter Sharp, Hiram Mabbett, Gustave Struckwald, and John S. Mitchell, twelve free, honest, and lawful men of the district, who were severally sworn and empanelled and charged by the court, and the jurors of the jury aforesaid, on their said oaths, respectively do say that they find the several issues herein in favor of the plaintiff, and that the defendant does owe, and is indebted to the plaintiff, one thousand eight hundred dollars, in manner and form as the plaintiff hath herein declared; and came the defendant's counsel and moved the court for a new trial, for reasons filed, as follows:

Motion for new trial.

In the United States circuit court for the district of Wisconsin.

WILLIAM F. HAVEMYER
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

Now comes the defendant, by E. G. Ryan, its attorney, and moves the court for a new trial in this cause for the following reasons:

1st. Because the verdict is against law.
2d. Because the verdict is against evidence.
18 3d. Because the court improperly admitted evidence in behalf of the plaintiff.

4th. Because the evidence given by the plaintiff, if properly admitted, was insufficient for the plaintiff to recover.

5th. Because the court refused to give the instructions asked by the defendant.

E. G. RYAN,
Def't's Att'y.

And because no writ of error would lie to any judgment rendered in this cause, and because the questions involved are important and difficult, and the case is of peculiar interest, and because the questions arising have been frequently decided by the district judge against the defendant, and the defendant considers it due to justice that the argument of the foregoing motion should be heard before a full bench, the defendant further moves that the above motion for a new trial may be postponed and set down for a hearing on a bill of exceptions, (case,) or the report of the district judge of the trial, as the court may direct, at the next term or time when the judge of the supreme court shall sit in this court, so that the same may be heard before a full bench.

E. G. RYAN,
Def't's Att'y.

I certify that the above motions are not made for delay, but because I believe them essential to the just rights of the defendant.

E. G. RYAN,
Of Counsel.

Argument of motion for new trial.

19 April 27, 1863. This day the motion of the defendant's counsel for a new trial came on to be heard, and was argued by the counsel of the parties, and the argument not being concluded, the same was adjourned until to-morrow morning.

April 28, 1863. This day came the parties, by their counsel, and the argument of the motion of the defendant's counsel for a new trial being concluded, the court held the same under advisement.

And now, at this same term, (July term, 1863,) and on the thirteenth day thereof, to wit, on the twentieth day of July, A. D. 1863, the following proceedings were had, to wit:

2d trial by consent.

WILLIAM F. HAVEMYER
vs.
THE BOARD OF SUPERVISORS OF THE COUNTYOF IOWA.

July 20, 1863. This day came the parties, by their counsel, Mr. Carpenter, for the plaintiff, and Mr. Ryan, for the defendant, and by consent it is ordered by the court that a new trial be, and hereby is, granted, and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit: Robert Currom, Joel S. Wilcox, Joseph R. Treat, Rial Rolf, Richard Griffing, N. B. Caswell, Samuel Sexton, E. M. Foster, Truman G. Wright, James B. Kellogg, Barsley Throop, and Morgan L. Burdick, twelve free, honest, and lawful men of the district, who were severally sworn and empanelled, when a certificate of division of opinion be-
20 tween the judges as herein filed, the said jury was discharged; and said certificate of division is as follows:

Certificate of division of opinion.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the district of Wisconsin, began and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the sixth day) of July, A. D. 1863, present and presiding the Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States assigned to said circuit, and the Hon. Andrew G. Miller, district judge. On the thirteenth day of the said term, to wit, on the twentieth day of July, A. D. 1863, the following proceedings were had, to wit:

WILLIAM F. HAVEMYER
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA. } At law.

This day came the parties, by their counsel, Mr. Carpenter, for the plaintiff, and Mr. Ryan, for the defendant, and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit: Robert Currom, Joel S. Wilcox, Joseph R. Treat, Rial Rolf, Richard Griffiing, N. B. Caswell, Samuel Sexton, E. M. Foster, Truman G. Wright, James B. Kellogg, Barseley Throop, and Morgan L. Burdick, twelve free, honest, and lawful men of
21 the district, who were severally sworn and empanelled.

The plaintiff, in support of the said issue, read in evidence an act of the legislature of the State of Wisconsin, as follows:

AN ACT to authorize the counties and towns through which the Mineral Point railroad passes to aid in its construction.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. It shall be lawful for any county through any portion of which any part of the Mineral Point railroad shall run, or any town or incorporated city or village in such county, to issue and deliver to said company its bonds, payable to such person or persons, trustees or corporation, or to said company, at such time, for such sum or sums, at such rate of interest, transferable by general or special endorsement, or by delivery, and in such manner as may be agreed upon by and between the directors of said railroad company, and the proper officers of such county, town, or incorporate village, as hereinafter provided; and to receive in exchange for such bonds the stock or bonds of said railroad company in such manner as shall be agreed upon by and between the directors of said railroad company and the proper officers of such county, town, incorporated city or village, as hereinafter provided; but no such bonds shall be issued or delivered to said company by any such county, town, incorporated city, or village, unless a majority of the legal voters of such
22 county, town, incorporated city, or village, voting on the

question, shall first have voted in favor of such issue in the manner hereinafter prescribed.

SEC. 2. It shall be lawful for the Mineral Point Railroad Company to issue its bonds, payable to the treasurer of the State and his successors in office, or to bearer, in sums of one thousand dollars each, which shall not exceed, in the aggregate, ten thousand dollars per mile of the whole of the surveyed line of the said railroad, and bearing an interest not exceeding the rate of ten per centum per annum, payable at such place and at such time, not exceeding twenty years from their date, as said company shall elect, with a provision making them transferable by general or special endorsement, or by delivery, and all such bonds which shall be delivered to any such county, town, incorporated city or village, in exchange as aforesaid, shall contain a stipulation guaranteeing the payment of the principal and interest, which shall become due and payable on the bonds of the said county, town, incorporated city or village, received in exchange therefor by said company; and to secure the payment of such bonds and interest, it shall also be lawful for the said company to execute and deliver to the treasurer of the State and his successors in office, in trust for the use and benefit of the holders of any and all of said bonds, a deed of conveyance, to be called a second mortgage, of all the present and future to be acquired property of said company, in the whole of said railroad, including the right of way, and land occupied by said road, together with the superstruction and tracks thereon, and all rails and other material used thereon, bridges, viaducts, culverts, fences, equipments, depots, grounds, and buildings 23 thereon, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property; which said second mortgage shall be taken, deemed, and held to be subject and subsidiary to another deed of conveyance, to be called a first mortage, of all the aforesaid property; which said first mortgage, whether it shall have been executed prior or subsequent to said second mortgage in point of time, shall constitute the first lien upon said railroad and all of the aforesaid property; but said first mortgage shall not be issued to secure the payment of bonds to a greater amount than ten thousand dollars per mile, of the whole length of said road, nor bearing a rate of interest greater than at the rate of ten per centum per annum; and whenever such record mortgage shall be delivered to the treasurer of the State, and recorded in the office of the secretary of state, it shall constitute a perfect and indefeasible lien upon said railroad, and upon all the property described in it, subject only to the prior lien created by said first mortgage; provided, that the provisions of this act shall not apply to La Fayette county, or any town or incorporated village therein; and provided, also, that the provisions of this act shall not apply to the county of Green, or to any town therein.

SEC. 3. Whenever the said railroad company shall desire to exchange any amount of its stock or bonds for the bonds of any such county, town, or incorporated city or village, it shall make and deliver to the clerk of the board of supervisors of such county, the town clerk, or clerk of such incorporated city or village, as the case

may be, a definite proposition, in writing, signed by the pres-
24 ident and secretary of the said railroad company and sealed
with the common seal of said company, which proposition shall contain a distinct statement of the amount of the stock or of the bonds of said company, which the said company propose to issue to such county, town, or incorporated city or village, the time when said bonds shall be payable, the amount for which they shall, respectively, be issued, the rate of interest which they bear; and it shall also contain a distinct statement of the amount of the bonds of such county, town, or incorporated city or village, which the said company propose to receive in exchange for its stock or bonds as aforesaid, specifying the person or persons, trustee, or corporation to whom they shall be payable, the mode of transfer, the amount of each bond, and the aggregate amount, the rate of interest, and the time of payment. Upon receiving such definite proposition, the clerk of the board of supervisors of such county, the town clerk or clerk of such incorporated city or village, as the case may be, shall immediately call a meeting of the board of supervisors of such county, town, incorporated city or village, to take into consideration the propositions of said company, when, if deemed expedient, the said board shall publish, or cause to be published, a notice of an election to be held by the legal voters of such county, town, incorporated city or village, at the usual place or places of holding elections in such county, town, incorporated city or village, and at such time as he may designate, which shall not be less than twenty nor more than thirty days from date of such notice; which notice shall contain a full statement of the proposition, made by said railroad company, with reference to the exchange of its stock or bonds for
the bonds *for the bonds* of such county, town, or incorporated
25 city or village, and shall call upon the voters to deposit a bal-
lot, upon which shall be written or printed the words "For the railroad proposition," or the words "Against the railroad proposition," or other words tantamount thereto.

Sec. 4. Such election shall be held and conducted in the same manner that other general elections in such counties, towns, incorporated cities or villages are by law required to be held and conducted, and the votes cast at such election shall be counted, canvassed, and returned in the same manner as the votes at any such general election, and the canvassers shall make, certify, sign, and deposit with the clerk of such county, town, incorporated city or village a statement of the whole number of the votes cast upon the question, as well as a statement of the number for the railroad proposition, and the number against the railroad proposition; and such certificate shall be conclusive evidence of the fact as to the number of votes cast for or against such proposition, and also of the fact that such election was regularly held and conducted according to law.

Sec. 5. If a majority of the legal voters who shall vote on the question at any election to be held in any such county, town, incorporated city or village, in pursuance of the provisions of this act, shall, as indicated by the official returns of any such election, vote

"For the railroad proposition," it shall be the duty of the proper officers in every such county, town, incorporated city or village, upon receiving from the directors of said railroad company stock or bonds,
in conformity with the proposition of said railroad company, to
26 issue and deliver to the directors of said railroad company
the bonds of such county, town, incorporated city or village,
in conformity with said proposition.

SEC. 6. For the purpose of giving effect to the provisions of this act, the proper officers of every county, town, incorporated city and village mentioned in this act are hereby declared to be the chairman of the county board of supervisors, and the clerk of the board of supervisors in each county, the chairman of the board of supervisors, and the town clerk in each town, mayor, and city clerk of such incorporated city, and the president and clerk of each incorporated village; and all bonds issued by any of the said counties, incorporated cities or villages, shall be signed by the proper officers, as aforesaid, of the said counties, cities, and villages, under their incorporated seals, respectively, and all bonds issued by any such town shall be signed by the proper officers of such town, and have annexed to them the official certificate of the clerk of the county board of supervisors, under his official seal, that they are such officers, and that their signatures are genuine.

SEC. 7. Every county, town, incorporated city or village, which by the provisions of this act is authorized to issue any bonds, shall be severally liable in law faithfully, promptly, and at maturity, to pay and discharge the principal and interest due upon every such bond, and the separate faith of every such county, town, incorporated city or village shall, by the issue of said bond, be irrevocably, inviolably pledged for the prompt discharge of every such liability; and every such county, town, incorporated city or village shall annually levy a
tax upon all its taxable property for the payment of the annual
27 interest on all bonds which it may issue in accordance with
the provisions of this act, in addition to all other taxes, equal
in amount to the amount of the annual interest on all the bonds which it may issue as aforesaid.

SEC. 8. This act shall take effect and be in force from and after its passage.

Approved March 23, 1853.

It is admitted by the counsel of the parties that the said act was first published, after its passage, in the volume of local and private acts of the legislature, on the 4th day of October, 1853.

The plaintiff then, in support of the said issue, offered in evidence the proposition to the board of supervisors to issue the bonds, the canvass of the election on the railroad proposition, and the proceedings of the board of supervisors, together with one of the bonds issued in pursuance of said act and proceedings, with the coupons in suit. Copies of all which are annexed and made part of this record.

The reading of the said several papers in evidence being objected to by defendant's counsel, the judges of the said court divided in opinion upon the following points of law, and, on motion of plaintiff's counsel, ordered the same to be certified to the next term of the Supreme Court of the United States, to wit:

1. Whether the said act of the legislature of the State of Wisconsin, entitled "An act to authorize the counties and towns through which the Mineral Point railroad passes to aid its construction," approved March 23, 1853, under which these bonds were 28 issued, is a general law within the meaning of section 21, of article 7, of the constitution of the State of Wisconsin.

2. Whether the said act not being published as a general act, and having been first published after its passage in the volume of local and private acts, on the fourth day of October, 1853, and after the issuing of the bonds, is not such an exercise of power by the State government or legislature, showing that the act is not a general act, and is binding on the courts.

3. Whether, if the said act is such a general law, any act or omission of the said county, its officers, or electors, short of an election under the act, after the act was published in October, 1853, will render the bonds valid, or estop the defendant from questioning their validity in the hands of a *bona fide* holder.

Exhibit No. 1.—Proposition.

To the board of supervisors of the county of Iowa and State of Wisconsin:

The Mineral Point Railroad Company proposes to the county of Iowa that the proper officers of said county shall, for and in behalf of said county, make, execute, and deliver to the said railroad company the bonds of said county, to the amount of one hundred and fifty thousand dollars, in sums of one thousand dollars each, payable to the treasurer of the Mineral Point Railroad Company and his successors in office, transferable by general or special endorsement, or by delivery, bearing interest at the rate of eight per cent. per annum, payable semi-annually, on the first days of July and 29 January, in each year, at the Manhattan Bank, in the city of New York, with coupons attached, with the principal payable on the first day of July, 1868; and the said Mineral Point Railroad Company proposes to make, execute, and deliver to the said county of Iowa, in exchange for the aforesaid bonds of the said county, the second mortgage convertible bonds of the said railroad company, [*convertible into the stock of said company at the option of the county at any time before maturity,] to the amount of one hundred and fifty thousand dollars in sums of one thousand dollars each, issued in conformity with the provisions of an act entitled "An act to authorize the counties and towns through which the Mineral Point railroad passes to aid in its construction," approved March 23d, 1853, which bonds shall be payable to the treasurer of the State and

---

[*] The words inclosed in brackets are added in an apparently different handwriting.

his successors in office, or to bearer, be transferable by general or special endorsement or by delivery, and shall be part of an issue of bonds which shall not exceed, in the aggregate, ten thousand dollars per mile of the whole of the surveyed line of the said railroad, and bearing interest at the rate of eight per centum per annum, payable semi-annually, on the first days of July and January, at the Manhattan Bank, in the city of New York, with the principal payable on the first day of July, A. D. 1868, containing a stipulation guaranteeing the payment of the principal and interest, which shall become due and payable on any bonds of the said county of Iowa which may be received by the said railroad company in exchange for the bonds of the said railroad company, and that the payment of any such sum of principal or interest, on any of the bonds of said
30 county shall operate as a release and discharge of the said
railroad company from the payment of the same amount of the principal and interest of the bonds so issued by the said company; and to secure the payment of such second mortgage bonds and interest, the said railroad company propose to execute and deliver, in conformity with the provisions of said act, to the treasurer of the State and his successors in office, in trust for the use and benefit of the holders of any and all said bonds, a deed of conveyance to be called a second mortgage of all the present and future to be acquired property of said company in the whole of the said railroad, including the right of way, and land occupied by said railroad, together with the superstructure and tracks thereon, and all rails and other materials used thereon, bridges, viaducts, culverts, fences, equipments, depots, grounds, and buildings thereon, engines, tenders, cars, tools, materials, machinery, fixtures, and all other personal property; which said second mortgage shall be taken, deemed and held to be subject and subsidiary to another deed of conveyance hereafter to be executed of all the aforesaid property, to be called a first mortgage, which shall constitute the first lien upon said railroad and all the aforesaid property, but shall not be issued to secure the payment of bonds to a greater amount than ten thousand dollars per mile of the whole length of said road, bearing interest at the rate of eight per centum per annum, payable semi-annually.

To which proposition the president and secretary have hereunto
[SEAL] subscribed their names, and affixed the seal of said company, at Mineral Point, in said county, this 19th day of May, A. D.
31 1853.

MOSES W. STRONG,
President.
THO'S J. ALLEN,
Secretary.

STATE OF WISCONSIN,
Iowa County, *ss:*

I, John Herron, clerk of the board of supervisors of the county of Iowa, in the State of Wisconsin, do hereby certify that the foregoing is a true copy of a certain paper which I find in my office, endorsed

"Proposition Mineral Point R. R. Co. to Board of Supervisors of Iowa county," but which is not filed or recorded in this my said office. That I have compared the foregoing with its original, and certify that it is a correct transcript therefrom.

In witness whereof, I have hereunto set my hand and name, and affixed the seal of my office, being the seal of said board of supervisors, this 30th day of Jan'y, A. D. 1863.

[SEAL.]

[Stamp.]

JOHN HERRON,
Clerk of the Board of Super., Iowa County, Wis.

Exhibit No. 2.—Order for election.

MAY 25, 1853.

Record of the proceedings of the board of supervisors of Iowa county held at Mineral Point, May 25, A. D. 1853.

On the 25th day of May, A. D. 1853, the board of supervisors of the county of Iowa met pursuant to a call of the clerk, made in pursuance of an act entitled "An act to authorize the counties and towns through which the Mineral Point Railroad passes to aid
32 in its construction," when the following members from their respective towns appeared and answered to their names, to wit:

John B. Skinner, Ridgeway; E. L. Giddings, Wyoming; Samuel Zollinger, Waldwick; F. E. A. Holstead, Pulaskie; F. C. Kirkpatrick, Mifflin; John Covill, Linden; David McFarland, Highland; Nathaniel Butterfield, Clyde; G. M. Ashmore, Asena; John Messersmith, Dodgeville; Dellos Pulford, Mineral Point.

The board then proceeded to ballot for a chairman, which resulted in the election of John Messersmith.

On motion, it was ordered that the board adjourn till 9 o'clock, tomorrow morning.

MAY 26, 1853.

Board met pursuant to adjournment.

Ordered, That the clerk of the board be authorized to procure maps at the land office showing all the entries in each political town, and that the county treasurer be required to pay for the same in cash. *May 26th,* 1853.

On motion, a vote was to determine the calling of an election in pursuance of an act entitled "An act to authorize the counties and towns through which the Mineral Point railroad passes to aid in its construction;" which resulted as follows:

33 Those in favor of calling an election—John R. Skinner, E. L. Giddings, Samuel Zollinger, F. C. Kirkpatrick, John Covill, G. M. Ashmore, John Messersmith, Delos Pulford.

Those against calling an election—David McFarland, Nathaniel Butterfield, F. E. A. Holstead.

Ordered, That the account of James B. Gray be allowed at $\$25\frac{50}{100}$ in cash for fuel and stationery.

Ordered, That the account of O. J. Wright, for printing, be allowed at $\$31\frac{50}{100}$.

Ordered, That the account of the town of Mifflin be allowed, for the support of the poor, at $\$10\ \frac{10}{100}$ dollars.

Ordered, That the county treasurer and sheriff be, and are hereby, appointed a committee to erect a suitable privy, with two apartments, for the use of the county buildings, as soon as practicable, and that the clerk of the board be authorized to issue, and the chairman to sign, orders to pay the necessary expenses of the same.

Ordered, That the board of supervisors of the county of Iowa adjourn *sine die.*

STATE OF WISCONSIN,
Iowa County, ss:

I, John Herron, clerk of the board of supervisors of the county of Iowa, in the State of Wisconsin, do hereby certify that the above and foregoing is a true copy of the proceedings of the board of supervisors of the said county of Iowa, on the 25th and 26th day of May, A. D. 1853, as appears of record in my office; that I
34 have compared the foregoing with the original record of such proceedings so remaining in my office, and find and certify it to be a true copy of and correct transcript therefrom, and of the whole thereof.

In testimony whereof I have set my name and hand hereto, and affixed hereto the seal of my office, being the seal of the [SEAL.] board of supervisors of said county, this 29th day of January, A. D. 1863.

JOHN HERRON,
[Stamp.] *Clerk of the Board of Supervisors of Iowa County, Wisconsin.*

Exhibit No. 3.—Canvass of votes.

ELECTION ON RAILROAD PROPOSITION, JUNE 28, 1853.

STATE OF WISCONSIN,
County of Iowa, ss:

We, the undersigned, justices of the peace and clerk of the board of supervisors in and for the county of Iowa and State of Wisconsin, do hereby certify that on Tuesday, the 28th day of June, A. D. 1853, we proceeded to canvass the votes cast at an election held on the 20th day of June, A. D. 1853, on the proposition of the Mineral Point Railroad Company, made on the 19th day of May, A. D. 1853; that including the votes cast in the town of Dodgeville, which were six hundred and forty-six, (646,) the returns of which were not accompanied by a poll-list, the whole number of votes cast at said election on the question was twenty-five hundred and thirty-two, (2,532;) that the number of votes cast for the railroad proposition was thirteen hundred and forty-five, (1,345;) the number of votes cast

35 against the railroad proposition was eleven hundred and eighty-seven, (1,187.)

In witness whereof, we have hereunto set our hands this 28th day of June, A. D. 1853.

SAMUEL THOMAS,
Justice of the Peace.
EDWARD COOD,
Justice of the Peace.

A true copy. Attest:

JAMES B. GRAY,
Cl'k B'd Sup'rs, Iowa County.

STATE OF WISCONSIN,
Iowa County, ss:

I, John Herron, clerk of the board of supervisors of the county of Iowa, in the State of Wisconsin, do hereby certify that the above and foregoing is a true copy taken from the election book, so called—a book of records belonging to my office; that I have carefully compared the same with the original, and find and certify that the same is a true copy thereof, and correct and literal transcript therefrom, and of the whole thereof.

In testimony whereof, I hereto set my hand and the seal of my office, being the seal of the board of supervisors of Iowa county, in the State of Wisconsin, this 29th day of January, 1863.

[SEAL.]

[Stamp.]

JOHN HERRON,
Clerk of the Board of Supervisors of Iowa County, Wisconsin.

26 *Exhibit No. 4.—R. R. bond.*

United States of America, State of Wisconsin, Iowa county:

Bond to the Mineral Point Railroad Company.
$1,000.................No. 44.

Know all men by these presents, that the county of Iowa, in the State of Wisconsin, in conformity with the provisions of an act of the legislature of the State of Wisconsin entitled "An act to authorize the counties and towns through which the Mineral Point railroad passes to aid in its construction," approved March 23d, 1853, acknowledges itself to owe to Francis Vivian, treasurer of the Mineral Point Railroad Company, and his successors in office, or to the bearer hereof, the sum of one thousand dollars, which sum the said county of Iowa promises to pay to the said Francis Vivian, treasurer of the said company, and his successors in office, at the Bank of the Manhattan Company, in the city of New York, on the first day of July, in the year 1868, and also interest thereon, at the rate of eight per centum per annum, semi-annually, on the first day of each January and each July ensuing the date hereof, until the principal sum shall be paid, on presentation of the annexed coupons or interest warrants, at the said Bank of the Manhattan Company. For the payment and discharge of which said sum, both of principal and interest, faithfully, promptly, and at maturity, in conformity with the provisions of the seventh section of the act aforesaid, the faith of the said county of Iowa is irrevocably and inviolably pledged.

And the said county of Iowa further agrees that this obligation, and all rights and benefits arising therefrom, may be trans-
37 ferred by general or special endorsement, or by delivery, as if the same were a note of hand payable to bearer.

This obligation is one and part and parcel of an issue of one hundred and fifty bonds, each of the same tenor, amount, date, and conditions, amounting, in the aggregate, to the sum of one hundred and fifty thousand dollars.

In testimony whereof, the said county of Iowa hath hereunto caused to be affixed the seal of the county board of supervisors and [SEAL.] these presents, to be signed by the chairman and clerk of said board, this twenty-sixth day of July, A. D. 1853.

JOHN MESSERSMITH,
Chairman of the Board of Supervisors of Iowa County.

JAMES B. GRAY,
Clerk of the County Board.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of July, 1868, at the Bank of the Mahattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' rv' rs.

JAMES B. GRAY,
Clerk of Board Sup' rv' rs.

38 $40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of January, 1868, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v' rs.

JAMES B. GRAY,
Clerk of Board Sup' rv' rs.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of July, 1867, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said *said* county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v'rs.

James B. Gray,
Clerk of Board Sup' v'rs.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of January, 1867, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v' rs.

James B. Gray,
Clerk of Board Sup' v'rs.

39 $40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of July, 1866, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v' rs.

James B. Gray,
Clerk of Board of Sup' v' rs.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of January, 1866, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v' rs.

James B. Gray,
Clerk of Board Sup' v' rs.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of July, 1865, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v' rs.

Jamps B. Gray,
Clerk of Board Sup' v' rs.

40 **$40.** No. 44.

The county of Iowa, will pay to the holder hereof forty dollars, on the first day of January, 1865, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v' rs.

James B. Gray,
Clerk of Board Sup' v' rs.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of July, 1864, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board of Sup' v' rs.

James B. Gray,
Clerk of Board Sup' v' rs.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of January, 1864, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1863.

JOHN MESSERSMITH,
Chairman Co. Board Sup' v' rs.

James B. Gray,
Clerk of Board Sup' v' rs.

41 **$40.** No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of July, 1863, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup'v'rs.

JAMES B. GRAY,
Clerk of Board Sup'v'rs.

$40. No. 44.

The county of Iowa will pay to the holder hereof forty dollars, on the first day of January, at the Bank of the Manhattan Company, in the city of New York, on presentation hereof, being the interest due that day on the bond of said county, number 44, issued to the treasurer of the Mineral Point Railroad Company.

Dated July 26, 1853.

JOHN MESSERSMITH,
Chairman Co. Board Sup'v'rs.

JAMES B. GRAY,
Clerk of Board Sup'v'rs.

42 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, John M. Miller, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to the certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of William F. Havemyer against the Board of Supervisors of the county of Iowa.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this third day of September, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the said United States the eighty-eighth.

[SEAL.]

[Stamp.]

JAMES M. MILLER, *Clerk.*

Filed 25th November, 1863.

SUPREME COURT OF THE UNITED STATES.

No. 74, December Term, 1865.

WILLIAM F. HAVEMYER,
vs.
THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

PLAINTIFF'S BRIEFF.

MATT. H. CARPENTER,
Counsel.

Supreme Court of the United States.

NO. 74.

DECEMBER TERM, 1865.

WILLIAM F. HAVEMYER,

vs.

THE BOARD OF SUPERVISORS
OF THE COUNTY OF IOWA.

This is an action of debt, to recover the amount of certain coupons attached to the bonds of Iowa County, exchanged for the bonds of the Mineral Point Railroad Company in pursuance of Chapter 117, Private and Local Laws of the State of Wisconsin, 1853. The case comes here on certificate of division upon the following points of law:

1. " Whether the said act of the Legislature of the State of Wisconsin, " entitled, " an act to authorize the counties and towns through which " the Mineral Point Railroad passes to aid its construction," approved

" March 23, 1853, under which these bonds were issued, is a general law " within the meaning of Section 21 of Article 7 of the Constitution of " the State of Wisconsin.

2. " Whether the said act not being published as a general act, and " having been first published after its passage, in the Volume of Local " and Private Acts, on the fourth day of October, 1853, and after the " issuing of the bonds, is not such an exercise of power by the State " Government or Legislature, showing that the act is not a general act, and " is binding on the Courts.

3. " Whether if the said act is such a general law, any act or omission " of the said County, its officers or electors, short of an election under " the act, after this act was published in October, 1853, will render the " bonds valid, or estop the defendant from questioning their validity in " the hands of a *bona fide* holder.

The history of enactments, decisions, and practice of the State Government, upon which the first point certified, must be determined, is as follows :

The Constitution, adopted in 1848, provides, Art. VII, Sec. 21 : " The Legislature shall provide by law for the speedy " publication of all statute laws and of such judicial decisions " made within the State, as may be deemed expedient. *And " no general law shall be in force until published.*"

For years after the admission of the State into the Union, this provision that "no general law shall be in force until published," was supposed to be satisfied by a publication in fact, and as matter of general intelligence ; and a general law was understood to be one applying to the whole State. Upon this theory things proceeded in all departments of the Government, including the Courts, until 1859 ; when the profession and the people were startled by the decision of our Supreme Court, reversing both branches of this theory. holding that every *public* law was a *general* law within the meaning of the Constitution ; and that no publication of such a law could give it effect, except one made in pursuance of some law directing the manner and place of publication.

At the first session of the Legislature under the Constitution an act was passed entitled, "An act in relation to the printing of the present session of the Legislature," approved June 17, 1848, which provided (session Laws, 1848, p. 7,) for letting the printing by contract.

Sec. 4. " It shall be the duty of the Secretary of State within one week " from the passage of any law or joint resolution to furnish to the per- " son or persons appointed to print the laws, a correct copy of the same, " and it shall be the duty of the person or persons so appointed to furnish " within three weeks of the close of this session of the Legislature to the " Secretary of State at his office the prescribed number of copies of laws " completed according to contract."

At the same session an act was passed, approved June 29, 1848, organizing the judicial department of the State Government, entitled, "An act to provide for the election of judges, and for the classification and organization of the judiciary of the State of Wisconsin." Session Laws 1848, page 19. This act provided that an election of judges should be held on the first Monday of August, 1848. Another act entitled "An act to establish the times of holding Circuit Courts" was approved August 19, 1848 (Session Laws 1848, page 151,) providing that in the first Judicial Circuit a term should be held in and for the County of Green, on the *first Monday of September.*

These laws were published as matter of general intelligence, immediately after their passage; the election of Judges for the Supreme and Circuit Courts, was in fact held on the first Monday of August, and the Circuit Court commenced its session in the County of Green on the first Monday of September, 1848, *before the acts organizing the Court and authorizing the election of judges, were published according to the act first quoted;* as appears from the certificate of the publication of the laws of this session, September 9, 1848.

These were undoubtedly *general* laws, and according to the *new* decisions of our Supreme Court, were not in force until after the Judges were elected and entered upon the discharge of their duties; from which it follows that for years after Wisconsin was admitted, her entire judicial department was administered, justice dispensed, criminals imprisoned and hanged, by judges who had no right to their seats, and might have been removed from office by *quo warranto.* Such a construction of the Constitution, after ten years contrary practice by all departments and officers of the State government is not to be tolerated, unless it is forced upon us by irresistible provisions in that instrument.

By the R. S. 1849, chapter 5, it was provided: "Sec. 1. The Secreta-
" ry of State, immediately after any *general law* of the legislature, shall
" have been deposited with him, shall furnish a copy thereof to the per-
" son authorized to print the laws, *who shall immediately publish the same*
" *in a newspaper printed at the seat of government.*"

Sec. 2. " It shall also be the duty of the Secretary of State to furnish
" such printer, within twenty days after the adjournment of each session
" of the legislature, with a copy of all other laws not specified in the pre-
" ceding section," &c.

This law is believed to have remained in force until 1852, when the legislature provided: (Laws 1852, page 786.)

" Sec. 13. The laws passed at each session of the Legislature shall be
" divided by the Secretary of State and Attorney General, into two class-
" es, which shall be published and bound in two separate volumes. The
" first class shall include the laws of *a general nature*, joint resolutions
" and memorials; but no law incorporating a railroad, a plankroad, or
" other Company, shall be published therewith, unless such law specially
" requires that it be so published. The second class shall include all
" laws required to be published, which are not embraced in and pub-
" lished with the laws composing the first class."

" The title pages of the respective volumes shall express whether they
" contain the '*acts of a general nature*' or the '*private and local acts* and
" charters of incorporated companies.' "

In pursuance of this provision, the laws passed at the session of 1853, were classified by the Secretary of State and Attorney General, and were published in separate volumes. *The act authorizing the issue of the bonds in suit*, was passed at this session, *was determined to be a private and local law*, and was published accordingly, but not until after the election had been held and the bonds issued.

This classification and separate publication of our statutes has been continued to the present time—over ten years—and all the acts authorizing municipalities to loan their credit, (it is believed without a single exception,) have been published as "private and local" laws.

In 1854, the Legislature passed an act as follows:

Chap. 40. "An act to authorize the Towns therein named to subscribe
" for Plank Road stock."

" The people of the State of Wisconsin, represented in Senate and
" Assembly, do enact as follows:"

" Section 1. The boards of supervisors of the towns of GRAND CHUTE,
" Greenville, Hortonia, Mukwa, Centreville, Waupacca, Scandinavia
" Plover and Stevens' Point, or any of said towns, are hereby authorized
" under the restrictions and conditions hereinafter mentioned, to subscribe
" in behalf of said towns, or any of them to the capital stock of the Wolf
" River branch of the Winnebago Lake, and Fox River plank road company,
" such amounts not exceeding ten thousand dollars for any one
" town as may be declared by the board of directors of said company
" neccessary for the completion of said road at the time of such subscription,
" and to pay for the same in bonds of the town or towns so
" subscribing, payable in fifteen years from the date thereof, with interest
" at a rate not exceeding ten per cent. per annum, payable annually, at
" such place within or without the boundaries of this State as shall be
" therein named."

" Section 2. *The board of supervisors of any town so subscribing, and
" in which such bonds shall be issued, shall annually levy a tax upon the
" taxable property of such town*, sufficient to pay the interests upon such
" bonds together with the expenses of collecting and paying over the
" same after deducting any dividends that may be due to said towns,
" upon said shares of stock, so subscribed for by them, *and the
" treasurer of every such town shall collect the said tax and apply the proceeds
" thereof to the payment of the interest due on the bonds so issued
" by said town.*"

" Section 3. The shares of stock in said company that shall be issued
" to any town so subscribing and all dividends arising therefrom, shall be
" by the terms of said bonds, irrevocably pledged for the payment of
" principal and interest upon said bonds. *Provided*, that the board of
" supervisors of any town so subscribing may sell such shares of stock
" and apply the proceeds to the payment of interest and principal on the
" bonds so issued by said town."

" Section 4. When the pincipal sum named in such bonds shall become

" due, the boards of supervisors of each town so having issued them,
" *shall levy a tax upon the taxable property of such town sufficient for*
" *the payment of such principal sum*, with the expenses of collecting and
" paying over the same, and such tax shall be collected and paid over in
" the same manner as the tax mentioned in section second of this act.

" Sec. 5. The board of supervisors of each town so subscribing shall
" annually appoint one road stock commissioner for each town, who shall
" reside in such town, and shall attend all the annual or special meetings
" of the stockholders of said company, and shall be entitled to cast one
" vote for every share of stock which such town may hold in said com-
" pany; and in case of the absence or inability to attend of any such
" commissioner, he may appoint in writing, under his hand some other
" person who shall have the same power."

" Sec. 6. *No bonds shall be issued by any town, in pursuance of this*
" *act, unless a majority of the votes cast in said town at the election here-*
" *inafter mentioned, shall be in favor of the same.*

" *Sec. 7. A special election shall be called and held in each of the towns*
" *before named*, for the purpose of carrying this act into effect within six
" months after the passage of this act. At such election those voting in
" favor of the subscription of stock and the issuing of bonds in accord-
" ance with the provisions of this act shall put in ballots inscribed on
" them the word 'For the Road' and those voting against such subscrip
" tion and issue of said bonds, shall put in ballots inscribed with the
" words 'Against the Road;' *notice of such election shall* be given for
" two weeks successively next preceeding said election, in some news-
" paper printed in the county, where the town so voting is situated, *and*
" *such election and the canvass thereof, shall be held at the same place,*
" *and conducted by the same persons, and in the same manner in all re-*
" *spects as the annual town meetings of each town*"

" Sec. 8. This act shall take effect from and after its passage.

" Approved, February 10th, 1854."

This act it will be seen is identical with the one under which the bonds in this case were issued, in every respect material to the present question. An election was held on the 20th of May, 1854, which resulted in favor of issuing the bonds, and the bonds were accordingly issued; but the act was first published in the volume of private and local laws, on the 5th June, 1854, *after the holding of the election;* and the bonds were therefore in the same condition as those sued on in this cause; *and were void if the act was to be considered as a general law.*

Hewett vs. the Town of Grand Chute, 7 *Wis.* 282, was an action on the bonds issued by the town in pursuance of this act. The Court say, page 293;

"The cause of action is founded upon a *private statute,* or "rather upon certain instruments or contracts in writing which "derive their validity from such *private statute.* By the common law it was necessary to set out such statute in the declaration; otherwise the Court would not take notice of its provisions; *unlike* in this respect a *public statute* of which the "Court was bound to take judicial notice though the latter were "not pleaded. But Section 69 of the code of procedure provides as follows: 'In pleading a private statute, or a right "derived therefrom, it shall be sufficient to refer to such statute "by its *title* and the day of its passage, and the Court shall "thereupon take judicial notice thereof.' In this case the "plaintiff in his complaint, did refer to the statute from which "his right was derived by reference to its title and the day "of its passage, and he thus brought the whole statute within "the judicial knowledge of the Court, &c."

This decision was made at the June Term, 1858, and was the unanimous judgment of our Supreme Court, as to the character of all these laws allowing municipal corporations to issue bonds in aid of railroad and other corporations, because these acts are all identical so far as regards this question. The purchasers of municipal bonds therefore parted with their money for them, upon the assurance of the Legislature, the opinion of the highest law officer of the State, and the unanimous adjudication of our Supreme judicial tribunal, that the laws under which they were issued were *private and local laws,* and hence in force from their passage, *without publication.* This assurance was continued until June, 1859, long after all the bonds issued under these acts had been sold, and the municipalities had received the consideration for them; and until after the financial crash of 1857; when a majority of our Court which consists of three judges, newly elected, and fresh from the bosom of a debt ridden constituency, sought out a "new way to pay old debts," by holding that the laws authorizing the issuance of municipal bonds, were not private laws, *as was decided in Hewett vs. the town of Grand Chute*, 7 *Wis* 282; nor yet *public local* acts; but were *general laws, not in force until published in some manner provided by law.* And although this doctrine, entirely overruled Hewett vs. Town of Grand Chute, the Court in the latter cases, make no attempt to distinguish the act there construed, from the other similar acts, authorizing the issue of bonds by our towns and counties, in regard to which the new doctrine was declared.

The new decisions are as follows;

State vs. Leon, 9 Wis., 279 decided, A. D. 1859.
In re. Boyle, 9 Wis., 265 decided, A. D. 1859.
Clarke vs. City Janesville, 10 Wis., 136, decided, A. D. 1860.
Town of Rochester vs. The Alfred Bank 13 Wis., 432 do. 1861.
Berliner vs. Town of Waterloo, 14 Wis., 378 do. 1861.

I.

"In Gelpeche vs. the City of Dubuque, 1 Wallace, 175, this "Court say, quoting from the Ohio Trust Co. vs. Debolt, 16 "How. 432: 'The sound and true rule is that if the contract "when made was valid by the laws of the State as then ex-"pounded by all departments of the government, and adminis-"tered in its Courts of Justice, its validity and obligation can-"not be impaired by any subsequent action of the Legislature, "or decision of its Courts altering the construction of the "law."

"The same principal applies where there is a change of "judicial decision as to the constitutional power of the Legis-"lature to enact the law. To this rule thus enlarged, we "adhere. It is the law of this Court. To hold otherwise "would be as unjust as to hold that rights acquired under a "statute must be lost by its repeal."

This case falls fully within this principle. These bonds were issued in 1853, were disposed of, and were circulating in the market with full approbation of the Legislature ; the people of the county ; every department, including the judicial tribunals, of the State, until the year 1859 ; and during all these years, in which these bonds were made and sold, they were valid and legal contracts, and would have been enforced by our State Courts, upon the ground that the acts authorizing their issue were *private and local laws, and were in force from their passage without publication.* A contract valid in its inception and legal when made, by the constitution and laws of the State as administered and expounded in the State must be held valid always and everywhere, or this Court must deal a death blow to all commercial and international transactions.

The pointed language of this Court, in Gelpeche vs. Dubuque, applies with full force to the newly discovered doctrine of our Supreme Court. They look upon these contracts not as they were looked upon when made, but in a new light, which flickers for a moment in the darkness of financial distress; and have thrown out to their anxious and sinking constitents a new fangled construction of the State Constitution, to save them from sinking under the burden of their debts.

2. It is immaterial, in view of the decision of this Court in Gelpeche vs. Dubuque, whether or not the late decisions of our State Court is the sounder construction of our Constitution. In subsequent contracts this Court may so regard it ; but the action of the State, in its legislative, administrative and judicial departments, during the period of the making and negotiating of these bonds, must furnish the rule to be applied in all suits founded upon them ; whether, in the opinion of this Court, that action was right or wrong, in conformity to or in conflict with the sound construction of our State constitution ; because it is the law of the contract and cannot be changed without destroying the obligation of what was, when made, a valid and legal contract.

To give the late decisions a retroactive effect, and follow them to the extent of declaring void contracts, which the State and State Courts held valid when made, would render the right of citizens of another State to sue in the federal courts "utterly useless and nugatory."

Rowan vs. Runnels, 5 How. 134, 139.
Ohio Trust Company vs. Debolt, 16 How. 432.
Gelpeche vs. City Dubuque, 1 Wallace, 175.

II.

But even conceding that this Court can inquire into the validity of these contracts, beyond the construction of State authorities and Courts, at the time the bonds were issued and sold ; it is submitted that this is not a "*general* law," within the true meaning of the constitution of the State; and that the new decisions of our Supreme Court, are not only to be rejected because they destroy vested rights acquired under the former decision of the same Court, but because they are unsound in principle.

The provison in the Constitution is as follows: Art. VII, sec. 21. "The legislature shall provide by law for the speedy publication of all " statute laws, and such judicial decisions made within the State as may " be deemed expedient. And no *general law* shall be in force until pub" lished."

This provision must be read in connection with other provisions of the Constitution. It declares, Art. XI, sec. 1.—" Corporations without, " banking powers or privileges may be formed under *general laws*, but " shall not be created under *special act*, except for municipal purposes, " and in cases where, in the judgment of the legislature, the objects of " the incorporation cannot be attained under general laws. All *general* " *laws*, or *special acts* enacted under the provisions of this section may be " altered or repealed by the legislature at any time after their passage."

" Sec. 4.—The legislature shall not have power to create, authorize or " incorporate, by any general or special law, any bank or banking power " or privilege, &c., except as provided in this article."

Sec. 5.—" The Legislature may submit to the voters at any *general* " election, the question of bank or no bank, &c."

Art. IV, sec 18.—" No private or local bill which may be passed by " the legislature shall embrace more than one subject, &c."

1. Before any act of the Legislature can be pronounced inoperative for want of publication, it must be shown (1) that it is a *law* properly so called ; and (2) that it is a *general* law, Section 1 Art XI above quoted recognize the distinction, which exists, between *laws* and *acts* of the Legislature. Those statutes which prescribe a course of action, or enjoin, command or authorize acts of a class are laws ; those statutes which are particular and exceptional, are *acts*, not *laws*.

Austin's Province of Jurisprudence, determined, p. 13, 14 : "By every " command, the party to whom it is directed is obliged to do or forbear. " Now where it obliges *generally* to acts or forbearances of a *class*, a " command is a law or rule. But where it obliges to a *specific* act or for- " bearance, or to acts or forbearances which it determines specificially or " individually, a command is occasional or particular. In other words, " a class or description of acts is determined by a law or rule, and acts " of that class or description are enjoined or forbidden generally. But " where a command is occasional or particular, the act or acts, which " the command enjoins or forbids, are assigned or determined by their " specific or individual natures, as well as by the class or description to " which they belong." * *

" If Parliament prohibited simply the exportation of corn either for a " given period or indefinitely, it would establish a law or rule ; a kind " or sort of acts being determed by the act, and acts of that kind or " sort being *generally* forbidden. But an order issued by Parliament to " meet an impending scarcity, and stopping the exportation of corn *then* " *shipped or in port*, would not be a law or rule though issued by the " Sovereign Legislature. * * As issued by a Sovereign Legisla- " ture, and as wearing the form of a law, the order which I have now im- " agined would probably be *called* a law. And hence the difficulty of " drawing a distinct boundary between laws and occasional commands."

" An order for a general mourning, or order for a general fast is utter- " ed by a monarch, or sovereign assembly, on occasion of a public calami- " ty. Now though it is addressed to the community at large, the order " is scarcely a rule, (law,) in the usual acceptation of the term. For " though it obliges generally the members of the entire community, it " obliges to acts which it assigns specifically, instead of obliging *gener-*

"*ally to acts or forbearances* of a class. If the sovereign commanded that *black* should be the dress of his subject, his command would amount to a law. But if he commanded them to wear it on a specified occasion, his command would be merely particular." p. 17.

"Most, indeed, of the laws which are established by political superiors, or most of the laws which are simply and strictly so-called, oblige generally the members of the political community, or oblige generally persons of a class. * * * *

"Most of the laws established by political superiors, are therefore general in a two fold manner; as enjoining or forbidding *generally acts of kinds or sorts;* and as binding the whole comunity, or at least whole classes of its members," * * p. 17.

"It appears from what has been premised, that a law properly so called, may be defined in the following manner. A law is a command that obliges a person or persons. But as contra distinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, *and obliges generallg to acts or forbearances of a class.*" p. 18.

An act authorizing Iowa County in its discretion to subscribe to railroad enterprises generally, would be a law; because it would authorize it *generally to do acts of a class.* But would not be a *general* law, unless it authorized all counties in the State to do the same thing. It would be if applying to Iowa County alone, a local law; and might be a *public local*, or a *private law*.

2. An act authorizing any and all persons upon certain terms and conditions to organize as corporations, is a general law because it applies to the entire community; and has the same effect in every county and town of the State. A law relating to all the priests, lawyers, merchants, or mechanics of the State, would be a general law because it would apply alike to persons of the class mentioned, in any and every county. But a law relating only to the priests, lawyers or merchants of Iowa County would be a local law. Contending for the opposite doctrine, Mr. Ryan in his brief, says:

"Acts of the State Legislature creating a new county or a new town, or consolidating old ones; incorporating cities or villages, or repealing

“ their charters; establishing new judicial circuits, or changing the times
“ and places of holding their Courts; erecting local Courts or prisons; all
“ are essentially local, and yet clearly general statutes. So of acts of
“ Congress creating ports of entry or post-offices; providing for the ap-
“ pointment of District Judges or Marshals; authorizing the construction
“ of public buildings or harbors; these are geographically local acts, but
“ legally general acts. In the theory that local acts are private acts be-
“ cause local, all the legislation of Congress for the District of Columbia,
“ is private; and this magnificent structure built by the nation for the
“ use of the Federal Government, is a private building authorized by a
“ private act.” p. 16.

A law which affects the whole community, is a general law. It may well be maintained that acts creating new counties, or consolidating old ones, and many other of the acts above refered to are general laws, for this reason, *that they do affect the whole community.* “This magnificient structure, built by the nation for the use of the Federal Government” is not a private building, because every citizen in the Union has an interest in it, has toiled and been taxed and *stamped* to build and furnish it. The fact is that such laws are *not local* in any sense. An act of Congress admitting a new State into the Union, affects all the members of the Union. The Senators and Representatives of the newly admitted State take their places in Congress and thus lessen the power and neutralize the vote of the oldest of the States. An act which levies a tax upon the whole people of the Union, or makes an appropriation from the common fund of the nation to build the capitol buildings in Washington, or a light house at Cape May, or a road over the Rocky Mountains, is a general law, because it affects the whole community. But a law of Congress taxing only the people of Wisconsin, for such purpose would be, as to the Union at large, a local law.

In Wright vs. Paton, 10 John. 300, the act of Congress (Chap. 31, Laws 1803, 281 at large 237,) entitled “An act for the relief of insolvent debtors within the District of Columbia” was held to be a private statute as to the Union at large which must be pleaded. The act extended to all persons residing in this district, but as to the Union at large was a local law. The test by which we are to determine whether a statute is general or local, is this; does it effect the whole community; or, only those residing in a particular district? If the latter, no matter how large that district may be, it is a local law. And a local law is one of the opposites of a *general* law.

The cases in our Supreme Court, of State vs. Leon, in re Boyle, and Clark vs. Janesville, MAY PERHAPS be defended upon the ground, that the laws there expounded, did affect the whole community. But in the first case in regard to municipal bonds, The Town of Rochester vs. The Alfred Bank, the counsel it seems conceded, what it is submitted, was not necessary, that the act there in question fell within the principle of the former cases: and the Court without having their minds directed to the real distinction, adopted that concession. This was a radical error. The act authorizing the Town of Rochester to issue its bonds, did not affect the people of the whole State, or of any other town in the State, and should have been distinguished from the law creating a new seat of justice in the county; or creating a new political corporation like the City of Janesville.

ENGLISH STATUTES are now classified by law for the purpose of publication in separate volumes as follows: [1] general; [2] special; [3] public local; and [4] private.

Richards vs. Esto, 15 Mees. and W. 251.

In the case last cited, chap. 78, 14 Geo. 3, "An act for the better regulation of buildings" &c., (30 statutes at large p. 483.) which extended to the Cities of London and Westminister, and the liberties thereof, and other the parishes, precincts and places within the weekly bills of mortality, the parishes of St. Mary-le-bon, and other places specified; and the last section of which provided that *the act should be deemed and taken to be a public act*, was held to be "of a local" nature. The Court say;

" It seems singular that the new act, 7 and 8 vic. c. 84, should not be
" classed among public *local and personal* acts, for it is confined in its
" operation to the district in and about the metropolis, with power to Her
" Majesty to extend its limits. How this has happened cannot be ex-
" plained for it is clearly of a local and personal nature; *local as being*
" *confined to local limits*, &c. * * The 14 Geo. 3 c. 78, is of the same
" character in its general scope."

In Cock vs. Gent, 12 Mees. and W. 234, an act of parliament for establishing a Court of Requests within certain limits named in the act, in which any subject of the realm might sue a resident of the district for which the Court was established and which by its last section, was declared to be a *public act,* was held a *public local act.*

4 Co. Inst. p. 25. THE DIVISION OF ACTS OF PARLIAMENT. " Again " of acts of parliament some be *general* and some be *private* and *partic-* " *ular.*"

The Peo. vs. Morris 13 Wend. 325.—"Political powers conferred upon " a corporation for the local government of a place are not vested rights " as against the State ; and may be abrogated by the legislature, as well " by a *general* law affecting the whole State, as by a *special act* altering " the powers of the corporation."

Bronson J. People vs. Purdy 2 Hill 39, Speaking of the decision in " *People vs. Morris*, says : "In the next place the statute then in ques- " tion, did not touch the Village of Ogdensburg *alone*, or any other cor- " poration in particular. On the contrary it was a general law regulat- " ing the internal police of the State ; and with a single exception it ex- " tended alike to every city, town and village, and every citizen within " our limits. Corporate privileges were only touched incidentally, in the " same way that tax laws and other general statutes reach all persons, " whether natural or artificial. * * The difference between a general " excise law extending alike *to the whole State*, and a law touching the " charter of a single city is too manifest to require any illustration."

The chancellor in Gifford vs. Livingston 2 Denio, 387, speaking of the opinion in *People vs Purdy*, says : "That is precisely the distinction which " I attempted to draw in the case of Warner vs. Beers, between an act " of *general legislation extending alike to the whole State*, authorizing any " association of individuals to exercise corporate powers for certain pur- " poses, *and that special legislation* for the benefit of particular individu- " als, or for local projects, against which the two-thirds provision of the " constitution was intended to guard."

See also Warner v. Beers, 23 *Wend.* 127.

Buller J. in Samuel v. Evans, 2 *T. R.* 575, says : "It is astonishing " that a doubt could ever have arisen whether the statute 23 Hen. 6 c. 9 " were a general law or not ; *for it alludes to all arrests ;* and every " person who may be arrested is within the provisions of it."

Our own Supreme Court, in other cases understand and employ language like other Courts. *In Bull v. Conroe,* 13 *Wis.*

238, Dixon, C. J., speaking for the Court says: "I also agree with counsel, that the constitutional provision referred to, can be executed by *general laws* only, and that *local or special* legislation upon the privileges of debtors, which would deprive those residing *in certain places*, or belonging to particular classes, of the advantages conferred by law upon others, could not be sustained."

Gilbert on evidence, title "GENERAL AND PARTICULAR ACTS." Now the distinction between a general and a particular law is whatever concerns the kingdom in general is a general law; and whatever concerns a particular species of men, or some individuals, is a special law and must be pleaded." * * * *

"If the point of law be never so special, yet if it relates equally to all, it is a general law; *but a law relating to some counties or parishes, is special, 4 Con. 76*"

From an examination of these authorities we come to determine whether, the act in question under which these bonds were issued is *a general law*, within the meaning of the constitution, or whether it is to be classed as a special, local act.

The act is set out in full: Record p. 18: and provides, that Iowa County, [and the several towns of that County,] may subscribe for stock in the Mineral Point Railroad Company, in the manner, and upon the terms and conditions prescribed. This act is local and special in the strictest sense of those terms; and has no one characteristic of a *general law*. It applies to no county but this; and authorizes this county to subscribe stock, *not in railroad companies generally*, but in this company only, AND THAT BUT ONCE.

No other county in the state was affected by the law in any particular. No other county could avail itself of the provisions of the act; no other county could be taxed to pay for the subscription that county might make; no provision of the act could be *exercised* or *violated* except in that county. The Mineral Point Railroad Company was an existing monied corporation; and this act authorized the county to become a stockholder therein. In other words, the act is a *mere license* to two corporations of the State to enter into *a certain contract.* That contract once made, the whole power granted by the act was exercised and spent. Even this County could exercise the power it conferred but once, and could not enter into a contract with any other company, or any different contract with this Company, *than the one provided for in the* act. To call such *special license* a *general law*, is to confound all distinctions of words and things.

The learned counsel opposed has, in his brief, reasoned himself into a difficulty apparently for the sole purpose of showing that there is no way to get out of it. However this may be, it is clear, there is no necessity for getting into it. He says ;

" Here an election was authorized to be held by the legal voters of the " county TO BE CONDUCTED *according to the general election laws of the " State.* It cannot be doubted that indictment would lie, as in other " elections, for fraud, false voting and perjury. If this be not so, it is " miscalled an election ; and the act authorizes this issue of bonds, not " at the election of a majority of voters, constitutionally expressed, but " at the will of a mob or of a corrupt board of inspectors. *And yet it " follows, if that be not so and this be yet a private act, that indictments " will lie for public offences under a private statute.*"

It is submitted (1) that indictments may be, and frequently are founded upon private statutes.

Whartons Crim. Law, 93 and notes.
State v. Cobb, 1 Deve. and Bat. 115;

(2) The general laws of the State apply to and protect special as well as general elections. R. S. 1849, Chap. 13, provides for the punishment of all fraud, false swearing, and illegal voting, at any " *general special town, school district or charter elections.*" So that the election authorized by this local, private statute was fully protected by the general law ; and fraud, false swearing or illegal voting at this special election, would have been indictable, *not under this act*, but under the general statute. In such case, the indictment would have averred that by a private and local statute *setting it out in full*, a special election was authorized to be held in Iowa County, for a certain purpose ; that at such election, the defendant did, thus and so; and then have concluded "against the form and effect of" the general statute. To establish the doctrine contended for by Mr. Ryan,

he must make out, that an indictment is one of the instrumentalities "for conducting" an election; whereas it is only the remedy in case the election *has not been* properly conducted. Indictments are not preventive nor mandatory, but punative. "The indictment does not compel the per-
" formance, but only punishes the neglect of duty." Denman C. J. 10 A. and Ellis 566.

III.

But if we were to concede this to be a general law and therefore not in force until published; we yet contend that inasmuch as the law took effect within a few months after these bonds were issued, and after they had been voted for by the voters of the County, that the County is now estopped by its permitting the bonds to be issued and sold to *bona fide* purchasers.

Here, Clark vs. City of Janesville, 13 Wis, 414, will be cited against us. But upon this point the State Court is no authority. Conceding their power to declare whether or not the law was in force at the time the contracts were made, there their power ends; and the question of a subsequent ratification by acquiescence or other wise, is to be determined by general principles and not upon or by the constitution or laws of Wisconsin.

Foxcraft vs. Mallet, 4 How. 353.

Chicago City vs. Robbins, 2 Black., 418.

2. Again, upon this subject, our Court is not consistent with itself, and therefore this Court will not follow it.

Pease vs. Peck, 18 How. 595.

In re. Boyle, 9 Wis., 264 our Supreme Court held, that although the law creating a Municipal Court for Milwaukee County was a general law, and not in force until published, yet the judge and clerk who were elected at an election held under the act, but before it was published, were *de facto* officers, and their rights could not be questioned collaterally. The Court says:

" **And without determining what effect this would have upon the title**
" **of the judge or clerk of that Court to their respective offices, in a**

" direct proceeding to test their right, *yet an election having been had,* " *and they elected,* and having entered upon the actual exercise of their " duties, we think after the law became operative, so that the offices " were legal, they were officers *de-facto,* and that their right to hold the " offices cannot be enquired into in a collateral proceeding of this kind. " * * Neither do we say that it cannot be enquired into on *habeas* " *corpus* whether the officer sentencing a prisoner was an officer *de-facto.* " That enquiry might undoubtedly be made. Because, every person " assuming to exercise the anthority of an officer, does not thereby necessarily make himself an officer *de-facto.* But when it appears that the " person exercising the powers of an office, *is in by such a color of right,* " and that he has such possession of the office as makes him in law an " officer *de-facto,* then his acts as to third persons are valid, and his right " to hold the office can only be enquired into in some direct proceeding " for that purpose; and such it appears was the character of the officers " here."

This decision is well sustained by the authorities. In Peo. vs. Collins, 7 Johnson, 551, it was said in argument. " An officer *de-facto* is one " coming into office *by color of election,* and all his acts are good until he " is removed," " Kent Ch. J. *That law is too well settled to be discussed.*" In Fowler vs. Beebe, et al, 9 Mass., 234, a sheriff had been appointed by the Governor before the law creating the office took effect; the Court held that the sheriff was an officer *de-facto, holding under color of the appointment*; which appointment was, afterwards, in a direct proceeding, held void by the same Court. *Com. vs. Fowler,* 10 *Mass.*, 290.

The election, although had before the act took effect was held in re Boyle 9, Wis 264, *to give color of right,* to hold the office after the law took effect, and therefore the Judge was an officer *de-facto* and not a mere usurper.

But for the purposes of repudiation, the Court holds, (13 Wis. 419,) that an election authorizing the issue of bonds before the publication of the law, was " *an idle act, wholly unauthorized and of no importance whatever.*"

Clark v. Janesville, 13 Wis. 414.

If the election of Municipal Judge before the publication of the law creating the office gave the person elected *color of right* to hold the of-

fice, so that his right could not be enquired into in a collateral proceeding then the election in Iowa County, gave the County "color of right" to issue the bonds in suit; and their issuance under the facts of this case was a mere irregularity. Had proceedings been taken to enjoin the issuance of the bonds, upon that ground, they would have been successful. But after the authority has been executed with the acquiescence of all concerned, the bonds have been exchanged and the county received their equivalent, it is now too late for the County, after ten years to defend against a *bona fide* holder upon the grounds of *a mere irregularity* in their issuance.

Knox Co., Com., vs. Aspinwall, 21 How. 544.

In Mills vs. Gleason, 11 Wis., 490, our Supreme Court held, that bonds of the City of Madison, which were issued before the act creating the corporation had been published, and therefore before it was in force, might be ratified by the city after it had a legal existence.

The Court say: "If a man without any authority assumes to act as " the agent of another, although the act as to the other is of no validity, " yet if he subsequently ratifies it, and adopts it, and receives the benefit " of it, he is as much bound as though he had authorized it in the first " instant. *And we think this principle applicable to this case.* Here " everything was done necessary to authorize the issuing of the bonds, " except the publication of the charter, *all the parties however supposing* " *it to be in force.* If after it was in force, the city received the proceeds, " and appropriated them to its own use, and recognized the validity of " these bonds, we could not well imagine a case more fit for the application of this rule. And we think the following authorities fully justify " its application; *Charitable Society vs Dedham*, 1 *Pic.* 372; *Edwards* " *vs. The Grand Junction Railroad Co.*, 7 *Sim.* 85; *Goodly vs. Railroad Co.* 16 *E. L. and Eq.* 596."

The principle of this decision is, that the issue of the bonds by the officers of the corporation before the act creating the corporation was in force, is to be regarded as the act of one pretending to be an agent of the corporation, but having no authority, and that the act may be ratified by the corporation, *in pais* in the same manner that a principal may ratify the acts of one pretending to be his agent. The decision goes far beyond what is necessary for us in this case, because there the principal was not in existence at the time the agent pretended to act. Here the defendant was in existence as a corporation, and the act of issuing the bonds was, at the worst, an act performed by the defendants general agents, but without specific authority; and we have only to establish such subsequent conduct on the part of the defendant as in such case amounts to a ratification.

WHAT ACTS OF A PRINCIPAL WILL AMOUNT TO A RATIFICATION, when the ratification may be by acts *in pais?*

Story on agency, sec. 253, speaking of such acts of ratification, says: "For this purpose the acts and conduct of the principal are construed "liberally in favor of the agent. * * *Slight circumstances* and *small* "*matters* will sometimes suffice to raise the presumption of a ratification."

"Sec. 255. *Long acquiescence, also, without objection, and even the* "*silence of the principal,* will, in many cases, amount to a conclusive "presumption of the ratification of an unauthorized act. * * Thus for "example, if an agent without authority, should compromise a debt of "his principal who after knowledge of the fact, *should make no objection,* "but acquiesce for a length of time, in the act he would be bound by it."

Here the defendant, its officers and its people, all knew these bonds were to be, and were being issued and disposed of under this act of the Legislature. If the act was not in force, then the defendant, its officers and people *must be presumed to have known that fact.* They knew, upon this supposition, that the bonds were being issued irregularly; yet no step was taken to prevent their issuance, or enjoin their sale. For many years this acquiescence is continued; during which time these bonds are known by the defendant, its officers and people, to be passing from hand to hand in the stock markets of the country, and no notice is given to protect *bona fide* purchasers.

Suppose all the officers and corporators of a bank, have knowledge that its cashier claims the right to sign and issue its bills, and is doing so, and they are being passed from hand to hand as money, could the bank after years acquiescence in this conduct of its cashier, assert his want of authority, and defend against such bills in the hand of a *bona fide* holder? X

Here all proceeded with the belief that the law was in force, the election was held, the voters declared in favor of issuing the bonds; and must be deemed to have known that the proceeding was irregular, if it was so;

X Kent vs R. R. Co. 24 N.Y. 346

the county received the equivalent of the bonds, which it has retained to the present hour without objection or effort made to prevent the free circulation of its bonds as legal and valid securities. And now when called on to pay, it sets up an irregularity in the issuance of the bonds, which must be presumed to have been known to the defendant, it officers and tax payers, when the bonds were issued. This is too late; and this long acquiescence is a sufficient ratification.

MATT. H. CARPENTER,
Counsel for Plaintiff.

1178

SUPREME COURT OF THE UNITED STATES.

No. 145. 74

DECEMBER TERM, 1864.

WILLIAM F. HAVEMEYER, *Plaintiff*,

vs.

THE BOARD OF SUPERVISORS OF THE COUNTY OF IOWA.

Brief for the Defendant.

E. G. RYAN,

Of Counsel for the Defendant.

Starr & Son, Printers, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

No. 145.

WILLIAM F. HAVEMEYER,
vs.
THE BOARD OF SUPERVISORS OF
THE COUNTY OF IOWA.

This cause comes to this Court on a certificate of division in opinion. The certificate presents three questions to this Court. These questions will be, for convenience, discussed here in reversed order.

I.

The third question certified to this Court is this; whether, if the statute of Wisconsin under which the bonds in controversy were issued, is a general law within the meaning of Section 21 of Article 7 of the Constitution of that State, any act or omission of the defendant, its officers or electors, short of an election under the act, after the publication of it, would render the bonds valid, or estop the defendant from questioning their validity in the hands of a *bona fide* holder?

It would be very difficult, if not impossible, to discuss this question. It is submitted that it is an abstract question, not raised by the record in this cause, which it would be improper and dangerous for this Court to decide in this cause. With the highest respect for the judges of the Circuit Court who certified the question here, it is contended that it is one which they had no jurisdiction to certify, and which this Court has no jurisdiction to pass upon on this record.

An examination of the Statute of Wisconsin in question will show, that when the Raliroad Company to which it has relation, should have made a proposition to exchange its bonds for the bonds of the defendant, it would have been optional with the defendant to order an election, to determine the question whether or not the defendant should make the exchange; but when an election should have affirmatively decided in favor of the exchange, it would have become the ministerial duty of the chairman and clerk of the defendant, to execute and deliver the bonds of the defendant to the Railroad Company, without any further action of the defendant. (Sec. 2, 5, 6.) It will further appear that the bonds and the mortgage to secure them, to be given in the exchange by the Railroad Company, would not have been payable to the defendant, but to the treasurer of the State. (Sec. 2.) It may well be doubted whether a delivery of the bonds of the Railroad Company to the State Treasurer, would not have been a good delivery under the act. But however that may be, the only delivery averred in the declaration, is " that said chairman and clerk did receive then and there, from the said directors, bonds,"&c. This was perhaps a good delivery under Sec. 5 of the Statute ; but the receipt by the chairman and clerk, assuming the statute to be in force, would have been compulsory. And no evidence was offered tending to show that the bonds ever came to the hands of the defendant, or tending to show any fact subsequent to the exchange.

There are no recitals in the bonds themselves. There is therefore nothing in the record bearing on this question. The record discloses only the naked facts of the order of the defendant for the election, the election, the execution of the defendant's bonds by its chairman and clerk, and the exchange of these bonds by the chairman and clerk for the bonds of the Rail-road company.

It was not contended in the Court below, and it is not supposed that it will be contended here, that these facts have any tendency, of themselves, to render the bonds valid or to estop the defendant from questioning their validity, if the act was not in force.

Such an argument, if made, would be illogical. The assumption that the doing of an unauthorized act by a public officer or body, could operate as a ratification or estoppel, would involve the further assumption, that an unauthorized act of a public officer or body could not be questioned. If the unauthorized act could operate as a ratification of itself, or if parts of an unauthorized act consisting of several parts, could operate by way of ratification of each other, it would follow that no act could be practically unauthorized.

It is enough to say here, that neither in logic nor in law, can an act operate as a ratification of itself.

If the mere naked execution and delivery of these bonds by the chairman and clerk should estop the defendant, there is an end of this and of the other questions in this cause; and no municipal corporation could question the validity of any obligations executed in its name, without authority of law, by its officers. The reverse is expressly decided by this Court in *Aspinwall vs. Commissioners of the County of Daviess*, 22 Howard, 365.

The question under consideration, is essentially abstract. It calls for the opinion of this Court, whether *any* act or omission of the County, its officers or electors, under the condition stated, could render the bonds valid or estop the defendant. If any such act or omission could have such an effect, that would depend upon the character of the particular act or omission, the time of its occurrence, the persons by whom and with whom done or omitted and their authority, and generally the circumstances under which done or omitted. All these conditions rest, in the question, in supposition. The question precipitates the cause into the dark and dangerous labyrinths of conjecture. It seems impossible for the bar to frame an argument, or the Court to render a decision, upon *res gestæ* not in the record. It would certainly be dangerous and contrary to the safe rule of judicial decision, for the Court to declare the law in anticipation of the evidence, or to draw on its imagination for the facts, on which its adjudication should apply. The law is pronounced on facts proven, not on theories of fact conjectured. The defendant, without failing in any degree of the highest respect for the judges of the Court below and of this Court, has not the temerity to argue on suppositive facts.

And it is submitted that this Court has already substantially sanctioned these views. In ***Perkins* vs. *Hart***, 11 Wheaton 237, 254, the Court refused to pronounce any opinion upon a certificate of division in opinion, because it imperfectly stated the particular facts to which it referred, although all the facts appear to have been before it. *A fortiori*, the Court will not pronounce an opinion on a question unfounded in fact. In *White vs. Turk*, 12 Peters 238, this Court said: "The intention of Congress, in passing the act under which this proceeding has taken place, was that a division of the judges of the Circuit Court, upon a single and *material* point, in the progress of the cause, should be certified to this Court for its opinion; and not the whole cause." Here are no facts, material or immaterial.

The act of Congress authorizes a certificate of division, and the decision of this Court upon it, "whenever any question shall *occur* before a Circuit Court, upon which the opinions of the judges shall be opposed." (2 Statutes at large, 159.) The question here did not occur in the Court below, but only suggested itself as something which might occur; it did not *meet* the judges, and was not involved in any decision they were called upon to make. It is not an occurrence, but only a supposition, and not within the act of Congress.

And an opinion of this Court upon it, however respectable as doctrine, could not have the authority of a decision. *Ex parte Christy*, 3 Howard, 292. *Jenness vs. Peck*, 7 Howard, 612. *Carroll vs. Carroll*, 16 Howard, 286. [illegible]

It is submitted, in conclusion, that this question did not arise upon the trial in the Court below; that the Court below had no jurisdiction to certify it here; and that this Court has no jurisdiction to decide it.

II.

The second question certified to this Court is, whether, as the statute of Wisconsin was not published as a general act, and was first published in the volume of Private and Local Acts, the latter publication is not an exercise of power by the state government or legislature, showing that the act is not a general act and binding on the Courts?

The State Constitution provides that "no general law shall be in force until published." The first legislature which met under the constitution, made provisions for the publication of all legislative acts in volumes; and these provisions were amended from time to time But, in the publication in volumes, no distinction was made between general and private acts, until the passage of chapter 504 of the Session Laws of 1852, which went into force, May 12, 1852. Sec. 13 of this act was the authority under which the acts of 1853 were published. No provision, in the so called volume of General Acts of 1853, will be found modifying this section.

"The laws passed at each session of the legislature, shall be divided "by the Secretary of State and Attorney General, into two classes, "which shall be published and bound in separate volumes. The first "class shall include the laws of a general nature, joint resolutions and "memorials; but no law incorporating a railroad, plankroad or other "company, shall be published therewith, unless such law specially re-"quires that it be so published. The second class shall include all laws "required to be published, which are not embraced in and published with "the laws composing the first class. The title pages of the respective "volumes shall express whether they contain the 'Acts of a General "Nature,' or the 'Private and Local Acts and Charters of Incorporated "Companies.'" *Session Laws* of 1852, p. 787.

The most cursory examination of this section, will show that the Legislature did not attempt to divide the laws into general acts and private acts, assuming that it had the power to do so. The section does not use the ordinary and technical description used in the Constitution, *General Law* or *Act;* but the phrase, *Laws of a general Nature,* which is not technical. And this description is connected with joint resolutions and memorials, which the Constitution does not require to be published; excluding from this class all acts of incorporation, some of which must be and most of which are general laws. These, it places in the second class; and directs the second class to include this description of general acts and all private acts. Thus the first class is not to embrace all general acts, and the second class is not to be wholly or even mostly composed of private acts. The books generally classify statutes into public or general, and private or special. *Sedgwick's Stat. and Const. Law*, 30. In giving the titles of the two volumes, the section does not follow this classification, but directs the one volume to be entitled, "'Acts of a General Nature,' and the other, 'Private and *Local* acts, and Charters of Incorporated Companies.'"

This phrase is probably borrowed from the State Constitution. Sec. 3, Art. 4, provides that "No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title." Here the words, private and local, have clearly different significations, or the conjunction would have been copulative and not disjunctive. The language used is equivalent to the phrase, neither a private nor a local bill. The object of this section was evidently to prevent that, which the vernacular of the West, inelegantly but expressively, calls log-rolling. This could not well be apprehended in the passage of general acts relating to the whole State; but was equally to be apprehended in the passage of private bills, and of general acts of local interest. Two or more towns or counties could as well combine to secure the passage of two or more local bills as one measure, none of which could be separately passed, as two or more individuals to secure the passage of two or more private bills. And the use of the same language, in the distribution of the laws, was clearly in the same sense.

This shows that it was not the intention of the Legislature to classify its statutes by their legal character, but according to the public interest in having access to them. The first class is to contain all acts of a general nature, but not all general acts. The second class is to contain all general acts which are local, all charters which are public, and all private acts. Thus the second class is directed to include all legislation in regard to particular municipal corporations. These are local, but public, political bodies; integers of the aggregate State. It is believed that it was Chief Justice Marshall who said, (the language is from memory,) that municipal corporations were parts of the machinery by which the sovereignty exerts its powers in modern times. This Court repeatedly speaks of municipal corporations, as local political bodies possessing powers of local government. So does the Supreme Court of Wisconsin, and the Supreme Courts of probably every State in the Union. And it is inconceivable how a municipality, with a changing population, amounting from hundreds of political units to hundreds of thousands, and capable of including, and almost inevitably including, property of strangers affected by all legislation having relation to it, could be bound by a private act. If such an act as that now before the Court, can be held private, and yet operating on the municipalities to which it relates, then every county in the State could be governed by a similar private act; all the counties into which the State is subdivided, by a similar single private act; and the State itself issue its public securities under authority of a private act of its Legislature. If the act before the Court can be dealt with as a private act, it is not seen, on what distinguishing principle, absurd as the proposition is, all municipal law might not be found in private statutes.

But it is too late to contend, in the Courts of Wisconsin or of the Union, that a statute relating to a local municipal corporation, although a local act, is not a general act. "Geographically the law is local, but politically it is not." Stow, C. J., 2 Chandler's R. 256, 257; *State vs. Lean*, 9 Wisconsin R. 284; *Clark vs. Janesville*, 10 Wisconsin R. 176; *Fowle vs. Alexandria*, 3 Peters, 409; *East Hartford vs. Hartford Bridge Company*, 10 Howard, 533; *Sedgwick's Stat. and Const. Law* 32.

Legislation affecting municipalities, is public; such of it as relates to all municipalities, is of a *general nature*; such of it as relates to particular municipalities only, is *local*.

A reference to sec. 15 of chap. 504, of 1852, confirms the view already taken of the classification of laws. That section provides for eight thousand copies of the first class, and for three thousand only of the second class; and directs a more general distribution of the first class. This also tends to show that the classification was designed to be a convenient, not a technical, distribution. Charters of public corporations not municipal, and acts relating to particular municipalities, although general laws, are not laws of a general nature ; that is, they are not of such a nature that the whole public has necessary occasion for access to them. Hence the whole legislative theory of classification, publication and distribution.

If this view be correct, the question of the Circuit Court, under discussion, falls to the ground ; because the question rests upon the theory, that the second class of laws is designed to embrace private acts only.

AGAIN. It may well be doubted whether the act set forth in the record, being admitted a general law, was not properly placed in the second class. It is virtually an amendment of the charter of the railroad company to which it relates, which was a public act by scope and express declaration. *Session Laws* 1852, 630. See *Aspinwall vs. Commissioners of Daviess*, 22 Howard, 364. If it be so, it is certainly within the letter of the legislative definition of the second class.

SECONDLY. The question under consideration asks, whether the actual publication was not such an exercise of power by the State Government or Legislature, as shows that the act is not a general law and is binding on the Courts ?

All legislative acts are binding on all Courts from the time they constitutionally become statutes, and not before. A legislative intention to enact a law, not fulfilled, is of no effect. If the Courts can, under the Constitution of Wisconsin, dispense with publication, in giving effect to a public statute, it is difficult to perceive any distinction in principle, which could prevent them from dispensing with the approval of the executive or the action of the legislative departments. The constitution creates all these conditions precedent, of a public statute, and makes them equal. These questions, viewed in whatever light, resolve themselves into this ; can the Courts, in giving effect to the legislation of Wisconsin, supersede the Constitution of the State? If, for any reason, the act in the record shall be held to have been in force, before publication, the decision will be an exercise of legislative, not of judicial, function. It is certain, under this question of the Circuit Court, that the act did not take effect under the forms of the State Constitution ; and the question directly suggests a judicial power, to give effect to the act, in disregard of the constitutional forms of enactment. See *Sedgewick*, 67.

The state government is composed of the legislative, executive and judicial departments. The only function of the executive in the premises, was to sign the act ; which, if a general act, did not thereby become a law. The judicial department, as will be seen hereafter, have expressly declared, that such a publication has not such an effect. The legislature has done nothing more than to classify the acts.

If the publication of the act before the Court, being a public act, was properly made in the volume of laws of the second class, then the legislature exercised their constitutional power of prescribing the mode of publication, but did not attempt to determine the legal character of the law. If the publication of the act, being a public act, was improperly made in the volume of laws of the second class, then the officers who made the distribution disobeyed the legislative direction. In either case, it is difficult to comprehend upon what action of the legislature, the question under discussion rests.

But, assuming, as this question assumes, that the act before the Court is a general act within the meaning of the State constitution, the legislature had no power to make it a law before publication. They have not declared it to be a private law, and they had not the power. Lord Coke says, in effect, that the English parliament, all powerful as it is, cannot do some things, false and absurd in themselves. And the Supreme Court of the state has decided, if decision be necessary, that the question, whether an act be a general act or not, from its scope, is a judicial one. The distinction between general and private legislation is not arbitrary, but rests in the nature of things ; and is beyond legislative power. It is conceded that the legislature may give to a private act the *effect* of a public one, but this probably does not go beyond the convenience of judicial cognizance without pleading. Be that is may, it is submitted that the legislature has not the power of evading the constitution, by declaring a general act to be a private one, and to be in force without publication.

If this act be a general law and should have been published amongst laws of the first class, the question under discussion seems to resolve itself into a question of estoppel. It is perhaps a sufficient answer to say that a state cannot be estopped. It is perhaps a sufficient answer to say that estoppel is of fact, not of law. A party may be estopped from setting up the truth, but not the law. Such an estoppel would operate on the Court, not on the party.

If the act before the Court be a general act and should have been published amongst laws of the first class, the difficulty has arisen from the mistake or inadvertence of the Secretary of State and Attorney General.

These offices are created by the Constitution, and classified as administrative offices. As will be presently seen, they could not be clothed with any judicial function. Their duty in the premises was ministerial. *In re Boyle*, 9 Wisconsin, R. 266. And it is difficult to understand how their mistake in law should conclude any party, much less override a positive provision of the constitution which creates their offices. The delegation of this ministerial duty to them, may have been an unwise execution of the constitution. But, as in cases where statutes and constitutions conflict, the constitution must prevail, at whatever inconvenience.

Thirdly. The question whether a statute is public or private, is judicial. No question of interpretation is more purely judicial. The Constitution, (Art. 7,) exhausts the judicial power; and it is not competent for the legislature to vest it in persons or officers, other than such as the constitution prescribes. *Attorney Gen. vs. McDonald*, 3 Wisconsin R. 805.

Here, the duty of classification is given to ministerial officers. And their action is not only not binding, but is of no weight, in the Courts. It is for the judicial department to declare their acts right or wrong; not for them to impose judicial construction upon the Courts.

What was said by this Court of the Federal Constitution, is equally true of the Constitution of the State of Wisconsin. "The object of the Constitution was to establish three great departments of government; the legislative, the executive and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. * * * * * Congress might establish one or more inferior Courts; they might parcel out the jurisdiction among such Courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some Courts created under its authority." 1 Wheaton, 329, 331. See also, *Lafayette vs. Knowlton*, 2 Chandler R. 212; *Attorney Gen. vs. Brown*, 1 Wisconsin R. 513; *Ross vs. Outagamie*, 12 Wisconsin R. 26.

It is an essential element of free, constitutional government, that the three great functions of sovereign power should be distributed and separately vested. Order is as essential to the enjoyment of freedom, as to the exercise of power. And if any work of man can be compared, without impiety, with the works of the Creator, the order of the three great departments of government, revolving harmoniously in their proper orbits of the legislative, executive and judicial, which can never cross each other; without rivalry or conflict; each essential to the others; each beautiful in its own path of duty, and beautiful because in it; each equally, because appropriately, sustaining the social order, without which government is despotism and liberty is anarchy;—may be said to imitate, not ignobly, the course of the planets, with which an all-merciful Deity has studded space, for the enjoyment of his creatures.

It may seem that the confusion of the executive, legislative and judicial functions here resisted, is too insignificant for the argument. It is no insignificant confusion. Indeed, no violation of principle can be insignificant. *Obsta principiis.*

Fourthly. As will be seen from the decisions of the State Court, cited *infra*, it has been held that the effect of the publication of a general act in the volume of private and local laws, which ought to have been published in the volume of general laws, does not change the character of the act, but only delays its operation ; that it becomes a public statute on the publication, and is inchoate and inoperative for any purpose until published. It is submitted that these decisions are conclusive on this question.

It is submitted, in conclusion, that the question of the Circuit Court under discussion, must be decided in the negative.

III.

The first question certified to this Court remains ; whether the act of the legislature of Wisconsin, set forth in the record, is a general law within the meaning of *Sec.* 21 *of Art.* 7 *of* the State Constitution.

The seventh section of the act imposes the duty of annual taxation, to provide for the payment of its bonds to be issued under the act, on every county, town, incorporated city or village, which should make the exchange of securities contemplated by the act.

The power of taxation is an essential and exclusive attribute of sovereignty. It is unnecessary to argue, that it can be exercised only by public or general statute. This is the state rule of decision. *Clark vs. Janesville* 10 Wisconsin R. 177. Constitution, art. 8, sec. 8.

And the Court is met, *in limine*, by the difficulty of the alleged attempt to levy taxes by private statute.

It is true, that the question is not here, whether a *mandamus* should issue to enforce the tax. But it is contended that the only security for municipal bonds which might be issued under the act, provided by the act, and substantially the only security for them, being the tax, the seventh section is an essential part of the act; and that without it, the whole act fails.

If the alleged attempt to levy taxes by private statute be unconstitutional, then the whole act should be held inoperative. This is the state rule of decision. *Slauson vs. The City of Racine*, 13 Wisconsin R. 398. If it be true that taxes can be levied under a general law only; and if it be true that such a law cannot be in force until published; it follows that an attempt by the legislature to levy taxes under a private act, or an attempt by the Courts to convert a general act, levying taxes, into a private act, is a direct violation of the state constitution.

But there is direct authority that, even if the act had been in its general scope of a private character, yet a single provision giving an interest to the State, under any of its political functions, would make it in construction a public act. *The King vs. Bagg.*, Skinner 429. *Rogers' case* 2 Greenleaf 303. *Heredia vs. Ayres*, 12 Pickering 334.

It will be remembered that the publication of statutes, in separate volumes, commenced in 1853; and that the present question could not well have arisen upon any statute passed before that year.

And yet there is already a uniform current of decision, by the Supreme Court of the State, that acts of the character of that set forth in the record, are general laws within the meaning of the constitution, and cannot be in force until published.

[illegible]

The question first came before the Court in 1859, in the case of *The State. vs Lean*, 9 Wisconsin R. 279, 284, 291. This case was twice argued and twice authoratively settled, with great care and consideration.

The case turned upon an act of the legislature passed in 1858, authorizing an election in the County of Iowa, to decide upon the removal of the county-seat. When the election was held, the act had not been published. It was held that the act was a general law, within the meaning of the constitution, and could not be in force until published; and that the election and consequent removal of the county-seat, were void for want of authority.

This decision goes upon two independent grounds. First, that all laws relating to municipal corporations, are general; second, that the general provisions of law relating to elections were incorporated in the act before the Court. It is contended that the second reason applies equally to the act set forth in the record in this case. The latter authorizes an election; and, *ex vi termini*, the whole election laws of the State then in force, (Rev. Stat. 1849, Chap. 6,) applied to the election authorized by it. And the act itself provides that "such election shall be held and conducted in the same manner that other general elections in such counties &c., are by law required to be held and conducted," &c. This is as much an incorporation of the general law of elections, as in the act under consideration in *The State vs. Lean*, and as much within the reasoning of the Court.

Here, an election was authorized to be held by the legal voters of the county to be conducted according to the general election laws of the State. It cannot be doubted that indictment would lie, as in other elections, for fraud, false voting and perjury. If this be not so, it is miscalled an election; and the act authorizes this issue of bonds, not at the election of a majority of voters, constitutionally expressed, but at the will of a mob or of a corrupt board of inspectors. And yet it follows, if that be not so and this be yet a private act, that indictments will lie for public offences under a private statute.

Indeed, the use of the term 'election' in the act, seems to settle the question that this is a general act. Election, politically used, implies a high and fundamental exercise of political right. If it be true, as Mr. Justice Story has said in the great case of *Martin vs. Hunter's Lessee*, that the Constitution of the United States was ordained and established by the people of the United States: *a fortiori* it is true, that the state governments were established by the respective people thereof. In establishing them, the respective people of the states reserve to themselves, under self imposed limitations, the sovereign right of election of the public servants, to whom they see fit to delegate the exercise of the functions of government; so constituting a limited and representative democracy. The elective frachise, therefore, under the state constitutions, is the mode of exercising the power of sovereignty residuary in the people. It is the use by the people of an undelegated sovereign right. It is reserved and defined in the Constitution of Wisconsin, and the manner of its exercise provided. (*Art.* 3, *Sec.* 3.) So that not only the public law of the State, but the Constitution which founds the State, enters into and forms part of the act in the record. The highest political right existing under the state government, is put in motion by its provisions. And yet it is said that this is a private act; and that public elections, for public purposes, by public corporations forming part of the state government, may be authorized by a private statute.

The State vs. Lean is a leading case in the State, has been frequently affirmed and never doubted by the Supreme Court of the State.

The question was next presented to that Court in *Clark vs. Janesville*, argued in October 1859, and decided in January 1860, 10 Wisconsin R. 136. This case was very fully and ably discussed at the bar; and much effort was made to induce the Court to modify its rule of decision in *The State vs. Lean*. But the Court adhered to and affirmed its decision.

It will be noticed that the case of *Clark vs. Janesville* is strikingly like the case in this record. In that case, as in this, an action was brought against a municipal corporation, upon securities issued by the defendant to a Railroad company. In that case, as in this, there was an enabling act passed at the same session and published in the same volume. In that case, as in this, the election in favor of the exchange of securities was held, and the securities exchanged, before the publication of the enabling act. The corporation was held not to be liable on the securities so issued.

The enabling act in the case was, indeed, the charter of the city; and the argument that it was a public act was there more varied than here, but not stronger. And the Court again decides that acts relating to municipal corporations, are general acts within the meaning of the constitution.

The case was evidently well considered, and the decision reluctantly made. And it will be noticed that it was made after the decision by this

Court of *The Commissioners of Knox County vs. Aspinwall*, 21 Howard 539, which the State Court approves and follows.

The discussion of the question by the Court is all instructive, but too lengthy for quotation here. But the suggestion of the Court that general statutes are very frequently local, might be profitably followed out. Acts of the State Legislature creating a new county or a new town, or consolidating old ones; incorporating cities or villages, or repealing their charters; establishing new judicial circuits, or changing the times and places of holding their Courts; erecting local Courts or prisons; all are essentially local, and yet clearly general statutes. So of acts of Congress creating ports of entry or post-offices; providing for the appointment of District Judges or Marshals; authorizing the construction of public buildings or harbors; these are geographically local acts, but legally general acts. In the theory that local acts are private acts, because local, all the legislation of Congress for the District of Columbia, is private; and this magnificent structure, built by the nation for the use of the Federal Government, is a private building, authorized by a private act.

The question was next presented to the State Court *in re Boyle*, 9 Wisconsin R. 264. The act of the legislature there considered, was to establish a local Court with local jurisdiction. The Court holds it a general law in the sense of the constitution, not in force until published; and affirms its two previous decisions.

The next appearance of the question was in 1860, in *The Attorney Gen. vs. Foote*, 11 Wisconsin R. 14. This case turned on the same statute before the Court *in re Boyle*, which was affirmed; and judgment of ouster given against the defendant holding the office of judge of the Court, because his election preceded the publication of the act.

The question again come up in *Mills vs. Gleason*, 11 Wisconsin R. 470, argued in February and decided in July, 1860. In this case a municipal corporation had issued its bonds, before its charter was published. The Court applies to the act the same rule of decision, which it re-affirms; but holds the case before it taken out of the rule by ratification, subsequent to the publication of the charter.

The next cases appear to have been *The Town of Rochester vs. The Alfred Bank,* and *Phelps vs. same,* decided together, 13 Wisconsin R. 432. The act of the legislature before the Court in these cases, was of the same tenor of the act in this record. The election was held and the securities were exchanged before the publication of the act. The bonds contained recitals of regularity, not in the present case. But the Court applied the rule of decision adopted in *The State vs. Lean* and *Clark vs. Janesville,* which it re-affirmed.

It appeared in these cases that the bonds had passed into the hands of *bona fide* purchasers, without actual notice of their illegality.

It further appeared that the officers of the municipal corporation which issued the bonds, had voted on the stock received in exchange for them, after the publication of the act. And it was strongly urged that the recitals estopped the corporation from asserting that there was no law in force at the time the bonds were issued, authorizing the same; and that the vote upon the stock operated as a ratification, which cured the original invalidity. But the Court held that there was no estoppel, and that the officers of the corporation could not ratify the bonds so as to give them validity. The Court further held that the omission of the tax payers of the corporation, to take any steps to restrain the issue of the bonds, could not estop them from resisting a tax levied to pay the bonds; because the defect in the issue of the bonds being matter of law, all were chargeable with notice of it, and that the purchasers could not therefore be regarded as innocent holders. The Court again noticed the decision of this Court in 21 Howard, 534, and brings the case before it within that rule of decision.

It will be perceived that all the facts in this record tending to charge the defendant, were, in these cases before the State Court, with other very strong facts not present here. It will also be perceived that those were proceedings against the bonds, not upon them. That decision, therefore, more than covers this case. It is generally difficult to find an adjudication so decisive on any question admitting of discussion. And this Court, in deciding the present case, must necessarily follow or overrule the rule of decision in those cases.

The same question involved in the two last cases came again before the Court in December, 1861, and the same rule of decision was followed; the Court directly affirming its former decision. *Belinner vs. Wat-*

erloo, 14 Wisconsin, 378.

It was argued in this case, as in some of the others that the non-publication of the act should be pleaded. But the Court held that it was bound to take notice of public acts, and that this involved the necessity of determining for itself when such acts take effect.

These are the decisions of the Supreme Court of the state upon the constitution and laws of the State. This is the uniform and settled rule of adjudication followed by all the Courts of the State; and, in the State Courts, recognized and admitted by the bar of the State.

An examination of the cases will show that, whatever discrepancy there may be, more apparent than real, in the doctrine of ratification, there is none whatever on the question before this Court. On the contrary, it will be perceived that, while one judge originally dissented, the Court has long been a unit on the question ; and that in the progress of its decisions, the Court has grown firmer in its rule and stronger in its reasoning, until at last it deals with the question as not admitting of discussion at the bar, or needing it from the bench.

It would be an easy, but perhaps unprofitable task, to discuss the question by the light of the decisions of the Courts of England and other States. These have had their due weight with the Supreme Court of the State, and are extensively quoted in the discussions of the question. They are purposely omitted here, because not considered conclusive, as the decisions of the state tribunals on its own constitution and laws, are considered to be, under the wise rule established by this Court. *McKeen vs. Delancey*, 5 Cranch 22. *Polk's Lessee vs. Wendell*, 9 Cranch 87. *Thatcher vs. Powell*, 6 Wheaton 119. *Ellmendorf vs. Taylor*, 10 Wheaton 152. *McDowell vs. Peyton*, 10 Wheaton 454. *Bank of Hamilton vs. Dudley*, 2 Peters 492. *U. S. vs. Morrison*, 4 Peters 124. *Greene vs. Neal*, 6 Peters 291. *McCutchen vs. Marshall*, 8 Peters 220. *Harpending vs. Dutch Church*, 16 Peters 455. *Nesmith vs. Sheldon*, 7 Howard 812. *Carol vs. Carol*, 16 Howard, 275. *Pease vs. Peck*, 18 Howard, 595. *Fisher vs. Haldeman*, 20 Howard 186. *Parker vs. Kane*, 22 Howard 1. *Sumner vs. Hicks*, 2 Black 532. *Leffingwell vs. Warren*, 2 Black. 599. *Gelpche vs. Dubuque*, 1 Wallace 176.

Carpenter vs. Pennsylvania, 17 Howard 456, 462, came here indeed on writ of error to the Supreme Court of that State; but the language used by this Court is not qualified by that fact, and seems to be conclusive here; "This Court has no authority to revise the act of Pennsylvania, upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the state." In all respect to the authority of this Court, the defendant insists that this quotation is the law of the present case.

Wisely or unwisely, our system has conferred a certain range of concurrent jurisdiction, on the Federal and State tribunals. It would have been an intolerable evil, had this jurisdiction been so exercised as to establish conflicting rules of decision, operating within the same jurisdiction. On all questions arising under the Constitution, laws and treaties of the United States, the decisions of this Court are appropriately made paramount authority, binding equally the Federal and the State authorities. But in questions of State institutions and policy, not conflicting with the Federal Constitution, the several State Courts are the appropriate tribunals to give the rule of decision; and this Court has, therefore, from the earliest times, with high judical comity and political sagacity, followed the rule of State decision, whenever such a rule was to be found clearly established. And it will be a grave calamity, not only to the judicial, but to the political, history of the Country, if time should ever witness the departure of this Court from its ancient practice of just and conservative forbearance, and its disregard of the State rule of decision on questions of purely State Law. *Stare decisis*, is a confession of judicial fallibility; but it is a maxim which, if fully followed, would be the best substitute for judicial infallibility.

It is difficult to perceive any good ground for departure, in this case, from the general rule of this Court. The provision of the constitution is is absolute, and framed in no doubtful language. It is reasonable. Every person is charged with knowledge of public statutes; and it is not only reasonable but is merely just, that means be afforded of acquiring the knowledge with which all are charged. This is the policy of the State Consitution; and if it has worked inconvenience through neglect of individuals in transactions under State Laws, as in this case, it has worked far more good than evil. It has been a great benefit to the bench and the bar of the State: and whatever aids the bar in their professional labors or the bench in their judicial functions, is a great public good.

But that argument is unnecessary here. It is enough that the people of the State have so formed their constitution, and that the judiciary of the State have so interpreted it. That is their right, solely. The State having been admitted into the Union, under a Constitution approved by Congress, and not repugnant to the Constitution or Laws of the United States, no department of the Federal Government has power to set it aside, to treat it as a nullity, or to emasculate it by interpretation, in matters properly subject to it. That is substantially what the plaintiff seeks at the hands of this Court. The State made itself a constitution of bread, and this Court is invoked to give it a constitution of stone.

We are living in days of disorder. The relations between the States and the Union were well defined, and were most apportionate to secure the civil and political welfare of all within their borders. It was a beautiful system of order; and it was not only crime, but insanity to abandon its security, for the disorder of revolution, with its teeming womb of danger and evil. The spirit of revolution is of slow growth, however precipitate revolution itself may be. Perhaps one of the greatest dangers to the system, was the clashing of jurisdiction, never necessary in fact, and always wrong in law, between the State and Federal tribunals. The judicial history of Wisconsin is full of instruction, on the tendency of judicial invasion of jurisdiction, to unsettle the minds of men about their constitutional duties, and open them to revolutionary ideas. This Court is implored with confidence, not to follow the bad precedent, by disregarding the well established institutions of the State, and imposing upon it a constitution and system of legislation, which the State itself has not adopted. In these days it is the duty of all men, it is the highest duty of the judiciary, to guard well the boundaries between state and federal authority; and thereby to promote and confirm that mutual confidence, upon which all mutual relations greatly depend. In these days, it rests mainly with the judiciary, above all this great national tribunal, to preserve the order of our political system from all confusion; for all disorder tends towards revolution. Constitutional government is order; insubordination is disorder, and the seed of revolution. Insubordination is not merely of the inferior towards the superior; the superior may also be insubordinate. All violation of established order is insubordination, because all are the subordinates of order. This is gravely, but most respectfully said, because every day's experience reveals some new insubordination against our constituted system of government; to which the minds of men seem to be so accustomed, that they are in danger of forgetting that government is a constituted order; and, if not going to perdition, seem to be educating themselves for a condition like that of the place, of which one of the fathers of the Latin Church said, *ubi nullus ordo, sed sempiternus horror inhabitat.*

Because the Supreme Court of the State of Wisconsin, overruling the decisions of this Court, did violence to the Constitution of the United States, by construction; this Court is prayed not to retaliate, by overruling the decisions of the State Court, and violating the State Constitution, by construction.

Stress may be laid, on the other side, on the argument *ab inconvenienti.* In such a case, this argument should have little weight. And no other notice will here be taken of it, than to say that the argument is not on one side alone. If the Federal Courts, disregarding the decisions of the State tribunals, should hold the defendant liable for these bonds; the defendant will be remediless upon the securities received in exchange for them. The Federal Courts will be without jurisdiction to entertain actions on the bonds, or a bill to foreclose the mortgage, of the Railroad Company; and the State Courts, following the State rule of decision, will refuse to enforce them. So that the question here is not, whether the Constitution of the State shall give away to avoid inconvenience; but whether it shall be set aside, for the purpose of shifting inconvenience from one party to another. And this mere statement is, perhaps, the strongest argument used, why this Court should not exercise its great power, to overrule the State adjudications upon State institutions. In this identical controversy, we may have the decision of the Federal Courts enforcing one part of a contract, because authorized by State law; and the decision of the State Courts refusing to enforce the other part of the same contract, because not authorized by State law. This would not be judicial order, but judicial injustice; and the sin of it could not be laid to the State Courts.

IV.

It is presumed that the plaintiff will insist that the decisions of this

Court, in cases where the actions were brought on municipal bonds, have prejudged this case.

In the first place, the defendant has endeavored to show, that this Court is bound by its own rule, to follow the State adjudications, even against its own judgment.

In the second place, it is confidently submitted that the reported decisions of this Court are all in favor of the defendant's views of this case. The Supreme Court of the State gave great weight to the case of *Knox County vs. Aspinwall*, and founded several of its decisions in part upon that case. There, there was unquestioned authority of law for the issue of bonds. And the Court held that the bonds having been issued, intermediate irregularities, in the process prescribed by law for their issue, could not impeach the bonds in the hands of purchasers, who saw the authority and saw the bonds issued pursuant to the authority, and could not be expected to investigate the intermediate details. That case is not supposed to go beyond the maxim, *probatis extremis, præsumuntur media.* The Court expressly holds that the purchaser of such bonds, was bound to look to the statutory authority for their issue. This, the present plaintiff was bound to do, before he purchased, and therefore bound to enquire whether the act had acquired the force of a statute before the bonds were executed. Indeed, as every man is charged with knowledge of public law, including the knowledge when a general statute took effect, this plaintiff is chargeable with knowledge of the want of authority. This is the view of the State Court. And the case of *Knox County vs. Aspinwall*, which was relied on by the plaintiff below, seems a direct adjudication in the defendant's favor.

The cases in this Court of *Bissel vs. City of Jeffersonville*, 24 Howard 288; *Curtiss vs. County of Butler*, 24 Howard 436; and *Woods vs. Lawrance County*, 1 Black 386, seem to proceed on the same principle; certainly are not inconsistent with it.

It is understood that the plaintiff relies on the cases of *Gelpcke vs. Dubuque*; *Meyer vs. the City of Muscatine*, 1 Wallace 384; *Van Hostrop vs. Madison City*, 1 Wallace 291, and *Mercer County vs. Hackett*, 1 Wallace 83, all decided at the last term of this Court. In all these cases there was authority of law, and their application here is not preceived. In *Gelpcke vs. Dubuque*, this Court did not refuse to follow the decisions of the Supreme Court of Iowa, but only elected which of two rules of decision of that Court it would follow. All the cases in *Wallace*, are consistent with the principle in *Knox County vs. Aspinwall*, that there must be statutory authority, and that the purchaser must look to the statutory authority for their issue. The Court throughout plainly keeps in mind, the distinction between acts void for want of authority, and acts irregular under authority; as the Court states the defence in *Mercer County vs. Hackett*, "not that no law exists to authorize their issue, but that the bonds were not made in pursuance of the acts of Assemply authorizing them." A careful examination of all these cases will show their entire consistency with the rulings of the Supreme Court of Wisconsin, and with the decision of this Court in *Aspinwall vs. Daviess County*, 22 Howard 365. In that case there had been statutory authority; but before the authority had been fully executed, a new constitutional provision, repugnant to the authority, had been adopted. This Court held that the authority was controlled by the constitution; and that the execution of the authority, so controlled, was void. That decision seems to govern this case. There, the constitution rescinded a granted and partly executed authority; here, the constitution with-held an inchoate authority, executed while with-held. The same principle controls both cases; the apparent authority is subject to the constitution, and those dealing under it are bound to look to the constitution. *Caveat emptor.*

The decisions in all these cases, and that sought by the defendant here, are fundamentally based on a well known principle, often asserted and applied by this Court. Corporations, in their very nature, have only delegated and special powers, which they cannot exceed; and persons dealing with them are bound by the extent of the powers so delegated. In cases of private corporations, they are bound to inquire; in cases of public corporations, they are charged with notice.

It is therefore submitted that the authority of this Court, if necessary to the defendant with it.

"This case involves the validity of bonds issued by 'the County of Iowa' in aid of a railroad. The question is justly deemed an important one, and has given rise to much discussion, both in Court and out. It is supposed to involve not only private safety, but the public honor; and appeals have been made, on the one hand to protect tax payers from impending ruin, and on the other to preserve the honor and good name of the state, from the blight of repudiation. Appeals of this character can have no weight with a judicial tribunal. Not that Courts cannot look beyond the letter of a law in interpreting it. Undoubtedly they must construe it, as all written instruments are construed, by the light of surrounding circumstances. The existing condition of things, the evils to be remedied. the objects to be attained, may all be looked at, and frequently require to be looked at, with the closest scrutiny and the clearest judgment, in order to determine what the law is. But beyond that, Courts cannot go. They cannot turn aside from the conclusion to which such an examination leads them, either to avoid one evil consequence or another. It is the province of the judicial mind, like the compass, to declare the true direction of the law, without regard to whatever obstacles may lie in the way. It is for the legislative power, like the pilot, to make such changes as may be made to avoid these obstacles." *Per Curiam*, 10 Wisconsin, R. 165.

It is submitted in conclusion, that this Court must give an affirmative answer to the first question certified here by the Circuit Court.

There are other very grave questions arising on this record, which the defendant would have been glad to discuss. But it is understood, from the rulings of the Court in several cases, that on hearing certificates of division, the Court will not go beyond what is expressly certified. Indeed it may well be doubted, whether the discussion in the fourth point of this brief, will be entertained by the Court in the present position of the case.

E. G. RYAN,
Of Counsel for the Defendant.

1719